

## 74 Am. Jur. 2d Tender Summary

American Jurisprudence, Second Edition | May 2021 Update

### Tender

Romualdo P. Eclavea, J.D.

### [Correlation Table](#)

## Summary

### Scope:

This article discusses the general rules and principles of the tender of money or specific articles in payment or discharge of a specific debt or obligation.

### Treated Elsewhere:

Accord and satisfaction, tender of performance as, see [Am. Jur. 2d, Accord and Satisfaction § 47](#)

Carriers, tender to and delivery by, see [Am. Jur. 2d, Carriers §§ 285, 426](#)

Contract, tender of performance under, see [Am. Jur. 2d, Contracts §§ 597 to 599](#)

Deeds and other performance under contracts for the purchase and sale of real property, tender of, see [Am. Jur. 2d, Vendor and Purchaser §§ 1 et seq.](#)

Insurance matters, tender in respect of, see [Am. Jur. 2d, Insurance §§ 1 et seq.](#)

Legal tender, see [Am. Jur. 2d, Money §§ 10 to 15](#)

Mortgage, tender of payment in satisfaction of, see [Am. Jur. 2d, Mortgages §§ 324 to 339](#)

Partnership, partner's dissociation when business not wound up, time and tendering of payment, see [Am. Jur. 2d, Partnership §§ 540, 541](#)

Payment, general principles of, see [Am. Jur. 2d, Payment §§ 1 et seq.](#)

Sales and transfers of goods, tender of payment in connection with, see [Am. Jur. 2d, Sales §§ 1 et seq.](#)

Secured transactions, tender of payment in connection with, see [Am. Jur. 2d, Secured Transactions §§ 526, 527](#)

**Research References:**

**Westlaw Databases**

[American Law Reports \(ALR\)](#)

[West's A.L.R. Digest \(ALRDIGEST\)](#)

[American Jurisprudence 2d \(AMJUR\)](#)

[American Jurisprudence Legal Forms 2d \(AMJUR-LF\)](#)

[American Jurisprudence Proof of Facts \(AMJUR-POF\)](#)

[American Jurisprudence Pleading and Practice Forms Annotated \(AMJUR-PP\)](#)

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## 74 Am. Jur. 2d Tender I Refs.

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### Tender

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### I. In General

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  1

### A.L.R. Library

A.L.R. Index, Tender

West's A.L.R. Digest, Tender  1

### Forms

[Am. Jur. Legal Forms 2d §§ 246:17 to 248:23](#)

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## 74 Am. Jur. 2d Tender § 1

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Tender

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### I. In General

## § 1. Generally; definitions and distinctions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  1

### Forms

[Am. Jur. Legal Forms 2d §§ 246:17 to 248:23](#) (Tender of performance)

The word "tender" is generally defined as an unconditional offer of payment consisting in the actual production of a sum not less than the amount due on a specific debt or obligation.<sup>1</sup> A "tender" is an offer to pay a debt or discharge a duty, and the offer to pay involves, as a general rule, the actual production of the money and the placing of it in the power of the person entitled to receive it.<sup>2</sup> A "tender" is the unconditional offer of a debtor to the creditor of the amount of his or her debt, which means the real amount of the debt as fixed by the law; this does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount actually due.<sup>3</sup> A "tender" is an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom the tender is made, the condition or obligation would be immediately satisfied.<sup>4</sup> The requirement of a present ability to make good the offer is indispensable to give the offer the legal effect of a tender, and one does not satisfy that requirement by simply stating in writing or otherwise that he or she has tendered full performance when in fact he or she has not.<sup>5</sup>

The word "tender," as used in connection with mutual and concurrent promises, does not mean the same kind of offer as when it is used in reference to the payment or offer to pay an ordinary debt due in money where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, and the transaction is completed and ended; it means only a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts that the agreement requires him or her to perform provided that the other will concurrently do the things that he or she is required by it to do

and a notice by the one to the other of such readiness.<sup>6</sup> In other words, the term "tender" means to notify the other party to a contract that one intends to perform one's side of the bargain immediately or at a specific time and place and to demand that the other party must do likewise.<sup>7</sup>

Under the common-law definition, a "tender" is an offer of payment that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist.<sup>8</sup> The general common-law rules of tender do not apply where the matter of tender is regulated by statute in a particular matter or proceeding<sup>9</sup> as, for example, in a condemnation proceeding.<sup>10</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

"Tender" is an unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation. [Gatreaux v. DKW Enterprises, LLC, 2011 IL App \(1st\) 103482, 354 Ill. Dec. 892, 958 N.E.2d 1088 \(App. Ct. 1st Dist. 2011\).](#)

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Telemark Development Group, Inc. v. Mengelt, 313 F.3d 972, 49 U.C.C. Rep. Serv. 2d 880 \(7th Cir. 2002\) \(applying Illinois law\); Niemeyer v. Wendy's Intern., Inc., 336 Ill. App. 3d 112, 270 Ill. Dec. 215, 782 N.E.2d 774 \(1st Dist. 2002\); Graff v. Burnett, 226 Neb. 710, 414 N.W.2d 271 \(1987\); Davidson v. Rogers, 1970 OK 114, 471 P.2d 455 \(Okla. 1970\); Buffalo Ridge Corp. v. Lamar Advertising of South Dakota, Inc., 2011 SD 4, 793 N.W.2d 809 \(S.D. 2011\); Young v. Gumfory, 322 S.W.3d 731 \(Tex. App. Dallas 2010\), reh'g overruled, \(Oct. 12, 2010\).](#)  
As to the amount that must be offered, see [§ 20](#).
- 2 [19 Perry Street, LLC v. Unionville Water Co., 294 Conn. 611, 987 A.2d 1009 \(2010\).](#)
- 3 [Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 215 P.3d 457, 69 U.C.C. Rep. Serv. 2d 890 \(2009\), cert. denied, 130 S. Ct. 1512, 176 L. Ed. 2d 121 \(2010\).](#)
- 4 [Cochran v. Griffith Energy Service, Inc., 191 Md. App. 625, 993 A.2d 153 \(2010\), cert. denied, 415 Md. 115, 999 A.2d 179 \(2010\).](#)
- 5 [Bembridge v. Miller, 235 Or. 396, 385 P.2d 172 \(1963\).](#)
- 6 [Robins v. Mack International Motor Truck Corp., 113 N.J.L. 377, 174 A. 551 \(N.J. Ct. Err. & App. 1934\).](#)
- 7 [Luccia v. Ross, 274 S.W.3d 140 \(Tex. App. Houston 1st Dist. 2008\), reh'g overruled, \(Jan. 16, 2009\) and review denied, \(Apr. 17, 2009\).](#)
- 8 [North Marion School Dist. No. 15 ex rel. Trejo v. Acstar Ins. Co., 206 Or. App. 593, 138 P.3d 876 \(2006\).](#)
- 9 [State By and Through State Highway Commission v. Efem Warehouse Co., 207 Or. 237, 295 P.2d 1101, 70 A.L.R.2d 797 \(1956\); Stolze v. Milwaukee & L.W.R. Co., 113 Wis. 44, 88 N.W. 919 \(1902\).](#)
- 10 [State By and Through State Highway Commission v. Efem Warehouse Co., 207 Or. 237, 295 P.2d 1101, 70 A.L.R.2d 797 \(1956\).](#)

## 74 Am. Jur. 2d Tender § 2

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### Tender

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### I. In General

## § 2. Purpose

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  1

The purpose and object of a tender is to enable the other party to accept the money and close the transaction and thus relieve the party making the tender from further liability on the debt or obligation.<sup>1</sup> An unjustifiable refusal of a sufficient, bona fide tender places the refusing party in default and permits the tendering party to exercise his or her remedies for breach of contract.<sup>2</sup> More specifically, the purpose of the law of tender is to enable the debtor to relieve himself or herself of interest and costs and to relieve his or her property of encumbrance by offering his or her creditor all that he or she has any right to claim; this does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount actually due.<sup>3</sup>

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### Footnotes

- 1 [Cleveland, C., C. & St. L. Ry. Co. v. Anderson Tool Co.](#), 180 Ind. 453, 103 N.E. 102 (1913); [Graff v. Burnett](#), 226 Neb. 710, 414 N.W.2d 271 (1987).
- 2 [Walker v. Houston](#), 215 Cal. 742, 12 P.2d 952, 87 A.L.R. 937 (1932).
- 3 [Indian Springs LLC v. Indian Springs Land Inv., LLC](#), 147 Idaho 737, 215 P.3d 457, 69 U.C.C. Rep. Serv. 2d 890 (2009), cert. denied, 130 S. Ct. 1512, 176 L. Ed. 2d 121 (2010).

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## 74 Am. Jur. 2d Tender II Refs.

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Tender

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II. Necessity and Waiver

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Tender](#)  4, 5

#### A.L.R. Library

A.L.R. Index, Tender

West's A.L.R. Digest, [Tender](#)  4, 5

#### Forms

[Am. Jur. Pleading and Practice Forms, Tender §§ 27, 28](#)

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## 74 Am. Jur. 2d Tender § 3

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### Tender

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### II. Necessity and Waiver

## § 3. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  4

A strict tender is not always required to protect the rights of a party from whom a tender would otherwise be required as where an actual tender is made impossible by circumstances that are not due to his or her fault or that he or she cannot avoid.<sup>1</sup> In the case of an obligation that is payable at a named place, a readiness at the time and place of payment, although the obligation is not there, is considered equivalent to a tender.<sup>2</sup>

There is authority holding that a default is cured by tender and not by the mere ability to pay or even an offer to pay.<sup>3</sup>

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### Footnotes

- 1 [Loftis v. Alexander](#), 139 Ga. 346, 77 S.E. 169 (1913); [O'Toole & Nedeau Co. v. Boelkins](#), 254 Mich. 44, 235 N.W. 820 (1931); [Duke v. Garrett](#), 263 S.W.2d 680 (Tex. Civ. App. Waco 1953).  
As to instances of tender made impossible, see § 4.
- 2 [Nelson v. State](#), 121 Neb. 658, 238 N.W. 110 (1931).  
As to the necessity of a tender of performance of contracts, see [Am. Jur. 2d, Contracts §§ 597 to 599](#).
- 3 [Magnolia Mountain Ltd., Partnership v. Ski Rio Partners, Ltd.](#), 139 N.M. 288, 2006-NMCA-027, 131 P.3d 675 (Ct. App. 2005).

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## 74 Am. Jur. 2d Tender § 4

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### Tender

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### II. Necessity and Waiver

## § 4. Excuses and justification for failure to make; waiver

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  5

### A.L.R. Library

[Rights as between vendor and vendee under land contract in respect of interest, 25 A.L.R.2d 951](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Tender § 27](#) (Answer—Defense—Tender excused by plaintiff's act of repudiation)

[Am. Jur. Pleading and Practice Forms, Tender § 28](#) (Answer—Defense—Tender excused by plaintiff's failure to appear)

A tender is excused where the amount depends on the balance shown by accounts that are inaccessible to the party from whom the tender would otherwise be required,<sup>1</sup> and where the amount to be tendered and the duty to make the tender are contingent upon the receipts and advances made under an agreement between the parties, and such information is ascertainable only from the accounts of the creditor, who does not disclose the required information to the debtor, no tender is necessary from such debtor the accounts being inaccessible to him or her.<sup>2</sup> Likewise, if the tender is prevented through the contrivance of the person to whom it should be made, it will be excused or be considered as if made.<sup>3</sup> A tender is not necessary when the creditor absents himself or herself or avoids the debtor in order to defeat it.<sup>4</sup>

One is not obligated to do the useless and futile thing in complying with the formalities of a tender.<sup>5</sup> Since the law does not require a useless formality, the making of a formal tender that otherwise would be required is excused where it is reasonably clear that if made, such a tender would be of no avail,<sup>6</sup> as where it appears that a tender, if made, will be refused<sup>7</sup> for some reason unrelated to the tender or its sufficiency, or that the creditor will accept it only on a condition that is not sanctioned by the contractual relation between the parties.<sup>8</sup> Also, a tender is excused by the imposition of unwarranted conditions by the person to whom it is to be made.<sup>9</sup> On the same principle, a formal tender is waived where the other party to the contract repudiates it by stating that he or she will not comply with it,<sup>10</sup> or demands the execution of a new agreement,<sup>11</sup> or where compliance by him or her has become impossible.<sup>12</sup> The present ability to make a strict tender is essential to bring the doctrine of waiver into operation—a debtor cannot claim waiver of a tender that he or she could not make for want of funds<sup>13</sup> unless the creditor explicitly waives the necessity of present possession of the necessary funds by the debtor.<sup>14</sup> Accordingly, a payee oil company's refusal to accept a gasoline station operators' offer to pay a specific sum in full settlement of all claims has been held not to constitute a breach of contract where the operators made only an offer to pay, and the operators were not shown to have made an actual, present, physical tender of payment.<sup>15</sup>

A tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted.<sup>16</sup>

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#### Footnotes

- 1 [Spinks v. Jordan](#), 108 Miss. 133, 66 So. 405 (1914).
- 2 [In re Campbell](#), 105 F.2d 197, 124 A.L.R. 1243 (C.C.A. 9th Cir. 1939).  
As to the consequences of a creditor refusing or neglecting to provide to the debtor the correct amount owed, see § 20.
- 3 [Land O'Lakes Creameries, Inc. v. Commodity Credit Corp.](#), 308 F.2d 604 (8th Cir. 1962); [O'Toole & Nedeau Co. v. Boelkins](#), 254 Mich. 44, 235 N.W. 820 (1931).
- 4 [O'Toole & Nedeau Co. v. Boelkins](#), 254 Mich. 44, 235 N.W. 820 (1931); [Schaeffer v. Coldren](#), 237 Pa. 77, 85 A. 98 (1912).
- 5 [Drewitz v. Motorwerks, Inc.](#), 706 N.W.2d 773 (Minn. Ct. App. 2005), *aff'd in part, rev'd in part on other grounds*, 728 N.W.2d 231 (Minn. 2007).
- 6 [Land O'Lakes Creameries, Inc. v. Commodity Credit Corp.](#), 308 F.2d 604 (8th Cir. 1962); [Miller v. Willey](#), 257 Ark. 961, 521 S.W.2d 68 (1975); [Machen v. Wolande Management Group, Inc.](#), 271 Ga. 163, 517 S.E.2d 58 (1999); [Sherwood v. Greater Mammoth Vein Coal Co.](#), 193 Iowa 365, 185 N.W. 279 (1921); [Chiles, Heider & Co., Inc. v. Pawnee Meadows, Inc.](#), 217 Neb. 315, 350 N.W.2d 1 (1984); [Sterling Development Co. v. Collins](#), 309 S.C. 237, 421 S.E.2d 402 (1992); [Henderson v. Foster](#), 139 Va. 543, 124 S.E. 463 (1924).  
As to the rule in equity, see § 5.
- 7 [Simmons v. Swan](#), 275 U.S. 113, 48 S. Ct. 52, 72 L. Ed. 190 (1927); [Schmitt v. Sapp](#), 71 Ariz. 48, 223 P.2d 403 (1950); [Machen v. Wolande Management Group, Inc.](#), 271 Ga. 163, 517 S.E.2d 58 (1999); [Chiles, Heider & Co., Inc. v. Pawnee Meadows, Inc.](#), 217 Neb. 315, 350 N.W.2d 1 (1984).
- 8 [Lewis v. Lee](#), 75 Ind. App. 263, 130 N.E. 443 (1921); [Henderson v. Foster](#), 139 Va. 543, 124 S.E. 463 (1924).  
As to the validity of conditional acceptance, see § 25.
- 9 [Sterling Development Co. v. Collins](#), 309 S.C. 237, 421 S.E.2d 402 (1992).
- 10 [Machen v. Wolande Management Group, Inc.](#), 271 Ga. 163, 517 S.E.2d 58 (1999); [Kuhlman v. Weiben](#), 129 Iowa 188, 105 N.W. 445 (1905); [Chiles, Heider & Co., Inc. v. Pawnee Meadows, Inc.](#), 217 Neb. 315, 350 N.W.2d 1 (1984); [Shannon v. Freeman](#), 117 S.C. 480, 109 S.E. 406 (1921); [De Grazier v. Craddock](#), 63 S.W.2d 866 (Tex. Civ. App. Dallas 1933), *writ dismissed*.
- 11 [Temple Enterprises v. Combs](#), 164 Or. 133, 100 P.2d 613, 128 A.L.R. 856 (1940).
- 12 [Rockland-Rockport Lime Co. v. Leary](#), 203 N.Y. 469, 97 N.E. 43 (1911).

- 13                    Somerton State Bank v. Maxey, 22 Ariz. 365, 197 P. 892, 14 A.L.R. 1117 (1921); Hall v. Heard, 223 Ga. 659, 157 S.E.2d 445 (1967).
- 14                    Somerton State Bank v. Maxey, 22 Ariz. 365, 197 P. 892, 14 A.L.R. 1117 (1921).
- 15                    Pollard Oil Co. v. Christensen, 103 Idaho 110, 645 P.2d 344 (1982).
- 16                    Mark Turner Properties, Inc. v. Evans, 274 Ga. 547, 554 S.E.2d 492 (2001).

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## 74 Am. Jur. 2d Tender § 5

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### Tender

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### II. Necessity and Waiver

## § 5. Necessity in equity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  4

Generally, the rules concerning the necessity for an actual tender are not applied with the same stringency in equity as at law.<sup>1</sup> Indeed, the technical rules governing tender in actions at law are not binding on a court of equity.<sup>2</sup> In equity, the failure to make a formal tender frequently may be cured by a plea of readiness and willingness and the payment of the money into court provided that a formal tender is not a condition precedent to the enforcement of the rights of the pleader.<sup>3</sup> Under certain circumstances, a tender may be a condition precedent to the enforcement of an action.<sup>4</sup> As at law,<sup>5</sup> an actual tender by the debtor is not necessary when it is plain, from the acts or conduct of the other party, or the circumstances or situation of the transaction or property, that a tender would be nugatory since equity does not require a useless and idle formality.<sup>6</sup> Where the other party has openly refused to perform in compliance with his or her contractual obligations, the debtor need not make a tender or demand; it is enough that the debtor pleads his or her ability, readiness, and willingness, and in his or her pleading offers, to perform his or her obligations.<sup>7</sup> Uncontradicted evidence in behalf of the debtor that he or she is ready, able, and willing to pay whatever amount a court in equity will determine, to whomsoever the court determines is entitled thereto, is sufficient to protect his or her rights equally with an actual tender where the fault for the nontender or nonpayment is not his or hers.<sup>8</sup> If a bill in equity contains a general offer to do equity in conformity with the decree of the chancellor, this will suffice without making an actual tender.<sup>9</sup>

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### Footnotes

- 1 [Caspar Lumber Co. v. Stowell](#), 37 Cal. App. 2d 58, 98 P.2d 744 (1st Dist. 1940); [Tevis v. Tevis](#), 259 Mo. 19, 167 S.W. 1003 (1914); [Niedermeyer, Inc. v. Fehl](#), 153 Or. 656, 57 P.2d 1086 (1936).
- 2 [F.H.T., Inc. v. Feuerhelm](#), 211 Neb. 860, 320 N.W.2d 772 (1982).
- 3 [Mayer v. Waterman](#), 150 Ga. 613, 104 S.E. 497 (1920); [Comstock Mfg. Co. v. Schiffmann](#), 113 Or. 677, 234 P. 293 (1925); [Karnes v. Barton](#), 272 S.W. 317 (Tex. Civ. App. Austin 1925).

4 Chiles, Heider & Co., Inc. v. Pawnee Meadows, Inc., 217 Neb. 315, 350 N.W.2d 1 (1984).  
5 § 4.  
6 Schmitt v. Sapp, 71 Ariz. 48, 223 P.2d 403 (1950).  
7 Sherwood v. Greater Mammoth Vein Coal Co., 193 Iowa 365, 185 N.W. 279 (1921); Bateman v. Hopkins,  
157 N.C. 470, 73 S.E. 133 (1911); Niedermeyer, Inc. v. Fehl, 153 Or. 656, 57 P.2d 1086 (1936).  
8 Niedermeyer, Inc. v. Fehl, 153 Or. 656, 57 P.2d 1086 (1936).  
9 Caspar Lumber Co. v. Stowell, 37 Cal. App. 2d 58, 98 P.2d 744 (1st Dist. 1940); Mayer v. Waterman, 150  
Ga. 613, 104 S.E. 497 (1920); Peak v. Peak, 228 Mo. 536, 128 S.W. 981 (1910).

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## 74 Am. Jur. 2d Tender III A Refs.

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Tender

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### III. Requisites and Sufficiency

#### A. In General

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  [11](#), [13\(.5\)](#), [13\(1\)](#), [15\(3\)](#), [17](#)

### A.L.R. Library

A.L.R. Index, Tender

West's A.L.R. Digest, [Tender](#)  [11](#), [13\(.5\)](#), [13\(1\)](#), [15\(3\)](#), [17](#)

### Trial Strategy

[Satisfaction of debt by payment of less than amount claimed to be due, 35 Am. Jur. Proof of Facts 2d 735](#) §§ 5, 11, 21

### Forms

[Am. Jur. Legal Forms 2d § 246:10](#)

[Am. Jur. Pleading and Practice Forms, Tender § 5](#)

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## 74 Am. Jur. 2d Tender § 6

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### Tender

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### III. Requisites and Sufficiency

#### A. In General

## § 6. Generally; tender made pursuant to contract

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  11

The rules governing tenders are strict and are strictly applied, and if the rules are prescribed by statute or rules of court, the tender must be in such form as to comply therewith.<sup>1</sup> The tenderer must do and offer everything that is necessary on his or her part to complete the transaction and must fairly make known his or her purpose without ambiguity, and the act of tender must be such that it needs only acceptance by the one to whom it is made to complete the transaction.<sup>2</sup> To effect a valid "tender," the tenderer must relinquish possession of the funds under such circumstances as to enable the person to whom it is tendered, without special effort on his or her part, to acquire possession.<sup>3</sup>

A tender that is made pursuant to a contract must conform to any provisions of the contract stipulating the requisites of any tender that is to be made under it.<sup>4</sup> Although the tender does not have to be in cash unless so demanded by the creditor,<sup>5</sup> it must demonstrate an ability to carry out the terms of the contract.<sup>6</sup> In contractual relationships, the actual delivery of legal tender is not required where there is a course of dealing that justifies the debtor in believing that some other means and form of tender will suffice, but such an excursion into the course of dealing, while justified in contract cases, is not appropriate when the rights are fixed by statute without regard to the expectations of the parties.<sup>7</sup>

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### Footnotes

- <sup>1</sup> [Nguyen v. Calhoun](#), 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (6th Dist. 2003).
- <sup>2</sup> [Nguyen v. Calhoun](#), 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (6th Dist. 2003).
- <sup>3</sup> [Jensen v. Covington](#), 234 S.W.3d 198 (Tex. App. Waco 2007).



- 4                    Graff v. Burnett, 226 Neb. 710, 414 N.W.2d 271 (1987); Furgang v. Epstein, 106 A.D.2d 609, 483 N.Y.S.2d  
103 (2d Dep't 1984).
- 5                    § 19.
- 6                    U.S. v. Allen, 699 F.2d 1117 (11th Cir. 1983) (applying Georgia law); Graff v. Burnett, 226 Neb. 710, 414  
N.W.2d 271 (1987).
- 7                    Birznies v. Cooper, 405 Mich. 319, 275 N.W.2d 221 (1979).

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## 74 Am. Jur. 2d Tender § 7

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### Tender

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### III. Requisites and Sufficiency

#### A. In General

## § 7. Production and offer

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  13(.5), 13(1)

### Forms

[Am. Jur. Legal Forms 2d § 246:10](#) (Contractual provision—Concurrent tender by both parties)

The essential characteristics of a tender are an unconditional offer to tender, coupled with the manifested ability to carry out the offer, and the production of the subject matter of the tender.<sup>1</sup> A mere offer to pay does not constitute a valid tender;<sup>2</sup> an offer to pay, in order to constitute a "tender," must be accompanied by a present manifest ability to pay.<sup>3</sup> For there to be a valid and legal tender under a contract, the tenderer must relinquish possession of money for a sufficient time and under such circumstances as to enable the person to whom it is tendered without special effort on his or her part, to acquire its possession.<sup>4</sup>

To constitute a tender of money, the money must actually be produced and made available for the acceptance and appropriation of the person to whom it is offered.<sup>5</sup> A valid and legal "tender" of money consists of the actual production of the funds to pay the debt involved.<sup>6</sup>

A valid tender requires not only the readiness and ability to perform but also the actual production of the thing to be delivered.<sup>7</sup> Where both parties are under a duty to perform concurrently, a valid tender is made if one party is ready, willing, and able to perform and gives notice to the other party of his or her readiness.<sup>8</sup> A tender implies the physical act of offering the money or thing to be tendered, but this cannot rest in implication alone since the law requires an actual, present, physical offer, and it

is not satisfied by a mere spoken offer to pay, which, although indicative of present possession of the money and intention to produce it, is not accompanied by any visible manifestation of an intention to make the offer good.<sup>9</sup> A statement by the debtor that he or she is there "to fix matters up," or "to attend to our business matters," made by telephone to the creditor, without more, does not constitute a tender.<sup>10</sup>

Just as a check written on insufficient funds does not constitute valid legal tender despite the drawer's willingness to deposit funds to cover the check,<sup>11</sup> the good faith of the drafter does not convert a voucher to a valid legal tender.<sup>12</sup>

The tender of payment is not required where it would be a vain and useless effort.<sup>13</sup> In the case of money due on a bond or note, the debtor cannot be deprived of the benefit of a tender by the neglect or refusal of the creditor to deliver up the evidence of the debt.<sup>14</sup> While a tender cannot be made of funds that are not the debtor's to tender and in which he or she then has no property interest,<sup>15</sup> it is not necessary, however, that the person making the tender should have the money in his or her own possession.<sup>16</sup> If the sum offered is absolutely refused, it is enough that the money was on the spot and ready for the purpose although in the possession of another.<sup>17</sup>

**Observation:**

In some jurisdictions, although a debtor seeking the benefit of the failure to accept a written offer statute must prove, at trial, that he or she had the funds necessary for payment at the time when the offer of payment was made, the statute does not require that the debtor's written offer to pay a particular sum include an express statement that the debtor has the funds necessary to do so.<sup>18</sup>

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**Footnotes**

- 1 [Rothe Development Corp. v. Department of Defense](#), 413 F.3d 1327 (Fed. Cir. 2005).
- 2 [Somerton State Bank v. Maxey](#), 22 Ariz. 365, 197 P. 892, 14 A.L.R. 1117 (1921); [Graff v. Burnett](#), 226 Neb. 710, 414 N.W.2d 271 (1987); [Rosencrans v. Fry](#), 12 N.J. 88, 95 A.2d 905 (1953).
- 3 [Indian Springs LLC v. Indian Springs Land Inv., LLC](#), 147 Idaho 737, 215 P.3d 457, 69 U.C.C. Rep. Serv. 2d 890 (2009), cert. denied, 130 S. Ct. 1512, 176 L. Ed. 2d 121 (2010).
- 4 [Roberts v. Clark](#), 188 S.W.3d 204 (Tex. App. Tyler 2002).
- 5 [McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co.](#), 345 Or. 272, 193 P.3d 9 (2008).
- 6 [Jensen v. Covington](#), 234 S.W.3d 198 (Tex. App. Waco 2007).
- 7 [Diamond v. Sandpoint Title Ins., Inc.](#), 132 Idaho 145, 968 P.2d 240 (1998) (tender requires a physical delivery of money); [St. George's Soc. v. Sawyer](#), 204 Iowa 103, 214 N.W. 877 (1927); [Faulkner v. Smith](#), 747 S.W.2d 592 (Ky. 1988); [Mr. U Inc. v. Mobil Oil Corp.](#), 197 Neb. 612, 249 N.W.2d 909 (1977); [Rosencrans v. Fry](#), 12 N.J. 88, 95 A.2d 905 (1953); [Jamaica Sav. Bank v. Sutton](#), 42 A.D.2d 856, 346 N.Y.S.2d 847 (2d Dep't 1973); [Zion's Properties, Inc. v. Holt](#), 538 P.2d 1319 (Utah 1975).
- 8 [Transaero Land & Development Co. v. Land Title of Nevada, Inc.](#), 108 Nev. 997, 842 P.2d 716 (1992).
- 9 [Somerton State Bank v. Maxey](#), 22 Ariz. 365, 197 P. 892, 14 A.L.R. 1117 (1921); [Mr. U Inc. v. Mobil Oil Corp.](#), 197 Neb. 612, 249 N.W.2d 909 (1977).

- 10                   Wooton v. Dahlquist, 42 Idaho 121, 244 P. 407 (1926).  
11                   U.S. v. Allen, 699 F.2d 1117 (11th Cir. 1983) (applying Georgia law).  
12                   U.S. v. Allen, 699 F.2d 1117 (11th Cir. 1983) (applying Georgia law).  
13                   § 4.  
14                   Somerton State Bank v. Maxey, 22 Ariz. 365, 197 P. 892, 14 A.L.R. 1117 (1921).  
15                   Vernon Center State Bank v. Mangelsen, 166 Minn. 472, 208 N.W. 186, 48 A.L.R. 710 (1926).  
16                   Richmond v. Hog Creek Oil Co., 229 S.W. 563 (Tex. Civ. App. Fort Worth 1920), writ dismissed, 239 S.W.  
                      904 (Tex. Comm'n App. 1922).  
17                   Richmond v. Hog Creek Oil Co., 229 S.W. 563 (Tex. Civ. App. Fort Worth 1920), writ dismissed, 239 S.W.  
                      904 (Tex. Comm'n App. 1922).  
18                   Malan v. Tipton, 349 Or. 638, 247 P.3d 1223 (2011).

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## 74 Am. Jur. 2d Tender § 8

American Jurisprudence, Second Edition | May 2021 Update

### Tender

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### III. Requisites and Sufficiency

#### A. In General

## § 8. Acceptance of tender

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  17

### Trial Strategy

[Satisfaction of debt by payment of less than amount claimed to be due, 35 Am. Jur. Proof of Facts 2d 735](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Tender § 5](#) (Notice—To debtor—Refusal of tender)

A creditor who receives a valid written offer of payment is entitled to choose whether or not to accept it, and as a general rule, silence does not indicate acceptance of an offer.<sup>1</sup> Under the common law, if the debtor actually produces, or "tenders," the coin of the realm and the creditor does not accept it, the debtor is relieved from liability for the consequences of nonpayment other than the debt, such as interest on the debt, but not from liability for the debt itself.<sup>2</sup> Also, under the common law, a legal tender is that kind of payment that the law compels a creditor to accept in payment of the debtor's debt when tendered by the debtor in the right amount, and if the creditor refuses to accept the money, title to the money reverts to the debtor.<sup>3</sup>

One to whom a bona fide tender is made must be given a reasonable opportunity to accept it.<sup>4</sup> A delay of several days by the creditor in accepting a tender is deemed so unreasonable as to warrant the debtor in treating it as a refusal, where the full amount due is tendered, and no delay beyond a few minutes is necessary to enable the creditor to accept or reject the tender.<sup>5</sup> The acceptance of a tender may be inferred in a particular case from the creditor's acts and conduct or omissions, as where it is held for an unreasonable time by the creditor without explanation or notice to the debtor, unless a contrary intent is made manifest to the debtor.<sup>6</sup> Where a creditor holds a tender for investigation or for other legitimate purposes, he or she is bound to notify the debtor promptly in order to escape the inference that he or she has accepted the tender.<sup>7</sup> A tender may be deemed rejected when a payee flouts custom and demands payment in a manner in which it has not heretofore been made.<sup>8</sup>

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Footnotes

- 1 [Malan v. Tipton, 349 Or. 638, 247 P.3d 1223 \(2011\).](#)
- 2 [Malan v. Tipton, 349 Or. 638, 247 P.3d 1223 \(2011\).](#)
- 3 [In re Frost, 171 N.J. 308, 793 A.2d 699 \(2002\).](#)
- 4 [Carter v. Sill, 63 Cal. App. 95, 218 P. 81 \(2d Dist. 1923\).](#)
- 5 [Florence v. Warren, 293 S.W. 226 \(Tex. Civ. App. Texarkana 1927\).](#)
- 6 [Equitable Life Assur. Soc. of U.S. v. Brandt, 240 Ala. 260, 198 So. 595, 134 A.L.R. 555 \(1940\).](#)
- 7 [Equitable Life Assur. Soc. of U.S. v. Brandt, 240 Ala. 260, 198 So. 595, 134 A.L.R. 555 \(1940\).](#)
- 8 [Gano v. Air Idaho, Inc., 99 Idaho 720, 587 P.2d 1255 \(1978\)](#) (evidence indicating that it was customary for the plaintiff employees to pick up their paychecks at the office of the defendant employer and that the defendant had never mailed any paychecks to the plaintiffs during their employment was sufficient to support the findings that upon returning to his office, the defendant's signature on the paychecks constituted a tender of wages due, that the plaintiffs failed to await the defendant's arrival, and that their failure to return to the office within a reasonable time constituted a rejection of tender).

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## 74 Am. Jur. 2d Tender § 9

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### Tender

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### III. Requisites and Sufficiency

#### A. In General

## § 9. Objections; waiver of grounds not specified

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  15(3)

An objection to a tender must be made at<sup>1</sup> or near the time of tender,<sup>2</sup> and the grounds for objection must be specified.<sup>3</sup> Otherwise, the objection is deemed waived.<sup>4</sup> An objection to a tender on one ground is a waiver of all other objections that could have been made at that time.<sup>5</sup> An objection to the medium of tender is waived if not promptly made,<sup>6</sup> and such an objection is waived by objecting on other grounds without any objection to the medium.<sup>7</sup> An objection to the medium of tender is not waived by accompanying it with objections on other specific grounds.<sup>8</sup> No objection can be based on the source from which the money comes where the tender is made by one entitled to make it.<sup>9</sup>

The objection that a tender is insufficient is waived where the objecting party's attitude makes the tender itself a vain and useless ceremony.<sup>10</sup> An offer to redeem, made in good faith, which is refused not because no tender, or an insufficient tender, is made, but because the right to redeem is denied, is effective if the right to redeem exists.<sup>11</sup>

In order that a debtor who is willing and able to pay his or her debt knows what his or her creditor demands, so that the debtor may make a conforming tender, some statutes provide that the objections to the tender must be specified.<sup>12</sup>

There is no waiver where the creditor is not present to object or where the creditor is given no opportunity to object.<sup>13</sup>

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### Footnotes

- 1 Chevron Oil Co. v. Clark, 432 F.2d 280 (5th Cir. 1970); Gaffney v. Downey Savings & Loan Assn., 200 Cal.  
App. 3d 1154, 246 Cal. Rptr. 421 (3d Dist. 1988); Unatin 7-Up Co. v. Solomon, 350 Pa. 632, 39 A.2d 835,  
157 A.L.R. 1304 (1944); First Sec. Bank of Utah, N.A. v. Maxwell, 659 P.2d 1078 (Utah 1983).
- 2 Gaunt v. Alabama Bound Oil & Gas Co., 281 F. 653, 23 A.L.R. 1279 (C.C.A. 8th Cir. 1922); Blackford v.  
Judith Basin County, 109 Mont. 578, 98 P.2d 872, 126 A.L.R. 639 (1940).
- 3 Gaunt v. Alabama Bound Oil & Gas Co., 281 F. 653, 23 A.L.R. 1279 (C.C.A. 8th Cir. 1922); Sellwood v.  
Equitable Life Ins. Co. of Iowa, 230 Minn. 529, 42 N.W.2d 346 (1950); First Sec. Bank of Utah, N.A. v.  
Maxwell, 659 P.2d 1078 (Utah 1983).
- 4 Lee v. Peters, 250 S.W.3d 783 (Mo. Ct. App. W.D. 2008) (also stating that when a creditor refuses the tender  
on the basis of Objection A, the creditor may not later claim that the tender was rejected on the basis of  
Objection B unless the debtor was made aware of Objection B at the time the tender was rejected).
- 5 National Labor Rel. Bd. v. Aluminum Wkrs. Int. Union, Local No. 135, AFL, 230 F.2d 515 (7th Cir. 1956);  
Sellwood v. Equitable Life Ins. Co. of Iowa, 230 Minn. 529, 42 N.W.2d 346 (1950); Leafgreen v. Labar,  
280 Pa. 215, 124 A. 443 (1924).
- 6 Thompson v. Crains, 294 Ill. 270, 128 N.E. 508, 12 A.L.R. 931 (1920); Minsky v. Zieve, 255 Mass. 542, 152  
N.E. 41, 51 A.L.R. 391 (1926); Burden v. Elling State Bank, 76 Mont. 24, 245 P. 958, 46 A.L.R. 906 (1926).
- 7 Gaunt v. Alabama Bound Oil & Gas Co., 281 F. 653, 23 A.L.R. 1279 (C.C.A. 8th Cir. 1922); Stevens v.  
Hines, 63 Cal. App. 80, 218 P. 57 (1st Dist. 1923); Sellwood v. Equitable Life Ins. Co. of Iowa, 230 Minn.  
529, 42 N.W.2d 346 (1950).
- 8 Strasbourger v. Leerburger, 233 N.Y. 55, 134 N.E. 834 (1922); Bickel v. Sheppard, 98 W. Va. 305, 127 S.E.  
41 (1925).
- 9 Heighe v. Sale of Real Estate, 164 Md. 259, 164 A. 671, 93 A.L.R. 81 (1933); Murray v. O'Brien, 56 Wash.  
361, 105 P. 840 (1909).
- 10 Blackford v. Judith Basin County, 109 Mont. 578, 98 P.2d 872, 126 A.L.R. 639 (1940).
- 11 Bundy v. Wills, 88 Neb. 554, 130 N.W. 273 (1911).
- 12 Sanguansak v. Myers, 178 Cal. App. 3d 110, 223 Cal. Rptr. 490 (1st Dist. 1986).
- 13 Weinberg v. Naher, 51 Wash. 591, 99 P. 736 (1909).

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## 74 Am. Jur. 2d Tender III B Refs.

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Tender

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### III. Requisites and Sufficiency

#### B. By and to Whom Made

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  6, 7

### A.L.R. Library

A.L.R. Index, Tender

West's A.L.R. Digest, [Tender](#)  6, 7

### Forms

[Am. Jur. Legal Forms 2d § 246:5](#)

Am. Jur. Pleading and Practice Forms, Tender § 29

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## 74 Am. Jur. 2d Tender § 10

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### Tender

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### III. Requisites and Sufficiency

#### B. By and to Whom Made

## § 10. Generally; by whom made

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  6

A tender, to be effectual, must be made by the obligor, primarily the debtor himself or herself,<sup>1</sup> or by one who is authorized in fact or in law to do so.<sup>2</sup> In some circumstances, a tender may be made by the debtor's successor in title.<sup>3</sup>

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### Footnotes

- 1 [Grafflin v. State, to Use of Ruckle, 103 Md. 171, 63 A. 373 \(1906\); Knudson v. Fenimore, 1916 OK 206, 69 Okla. 3, 169 P. 478 \(1916\).](#)
- 2 [§ 11.](#)
- 3 [E.J. Struntz Planing Mill Co. v. Paget, 123 Or. 651, 263 P. 389 \(1928\).](#)

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## 74 Am. Jur. 2d Tender § 11

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### Tender

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#### B. By and to Whom Made

## § 11. Generally; by whom made—Agent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  6

### Forms

Am. Jur. Pleading and Practice Forms, Tender § 29 (Reply—To plea of tender—Lack of authority of person making tender)

A tender may be made by an authorized agent of the debtor<sup>1</sup> where the creditor either knows that the agent is duly authorized or has reasonable opportunity to inform himself or herself that the agent has such authority.<sup>2</sup> The agent is in the position of a stranger, however, and a tender by him or her is not good where the creditor does not know that he or she is duly authorized to act in the debtor's behalf and has no reasonable opportunity to learn that fact.<sup>3</sup>

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### Footnotes

- 1 [Forderer v. Schmidt](#), 154 F. 475, 2 Alaska Fed. 754 (C.C.A. 9th Cir. 1907); [Grafflin v. State](#), to Use of [Ruckle](#), 103 Md. 171, 63 A. 373 (1906); [Richmond v. Hog Creek Oil Co.](#), 229 S.W. 563 (Tex. Civ. App. Fort Worth 1920), writ dismissed, 239 S.W. 904 (Tex. Comm'n App. 1922).
- 2 [Richmond v. Hog Creek Oil Co.](#), 229 S.W. 563 (Tex. Civ. App. Fort Worth 1920), writ dismissed, 239 S.W. 904 (Tex. Comm'n App. 1922).

3 [Richmond v. Hog Creek Oil Co.](#), 229 S.W. 563 (Tex. Civ. App. Fort Worth 1920), writ dismissed, 239 S.W. 904 (Tex. Comm'n App. 1922).

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## 74 Am. Jur. 2d Tender § 12

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### Tender

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### III. Requisites and Sufficiency

#### B. By and to Whom Made

## § 12. Generally; by whom made—Person entitled to be subrogated

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  6

A valid tender may be made by one who has the right to be subrogated to the rights of the creditor.<sup>1</sup> The owner of a half interest in a parcel of real estate has a right to tender the amount due on a mortgage on the other half interest, and the holder of the mortgage cannot refuse the tender on the ground that such owner is attempting to gain an advantage over his or her co-owner.<sup>2</sup>

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### Footnotes

- 1 [Grafflin v. State, to Use of Ruckle](#), 103 Md. 171, 63 A. 373 (1906); [Murray v. O'Brien](#), 56 Wash. 361, 105 P. 840 (1909).
- 2 [Murray v. O'Brien](#), 56 Wash. 361, 105 P. 840 (1909).

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## 74 Am. Jur. 2d Tender § 13

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#### B. By and to Whom Made

## § 13. Generally; by whom made—Stranger

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  6

Generally, a mere stranger to the obligation cannot make an effectual tender of payment of such obligation,<sup>1</sup> and in fact, a tender of payment by a stranger does not inure to the debtor's benefit.<sup>2</sup> One who has an interest in the property that secures the obligation in question is not a stranger to the obligation.<sup>3</sup> A tender by one who is privy to the debtor in relation to the obligation in question and who acts for and on behalf of the debtor is, in legal effect, a tender by the debtor himself or herself and not by a stranger.<sup>4</sup> A tender made by a stranger is good where subsequently ratified in good time by the party in whose interest it was made.<sup>5</sup>

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### Footnotes

- 1 [Brannon v. Cole](#), 40 Ala. App. 222, 110 So. 2d 645 (1959); [Walthour-Flake Co. v. Brown](#), 228 Ark. 307, 307 S.W.2d 215 (1957).  
As to tender by a stranger to a mortgage, see [Am. Jur. 2d, Mortgages § 330](#).
- 2 [Thomas Gordon Malting Co. v. Bartels Brewing Co.](#), 206 N.Y. 528, 100 N.E. 457 (1912).
- 3 [E.J. Struntz Planing Mill Co. v. Paget](#), 123 Or. 651, 263 P. 389 (1928).
- 4 [Mathews v. Union Central Life Ins. Co.](#), 107 Kan. 669, 193 P. 337 (1920).
- 5 [Forderer v. Schmidt](#), 154 F. 475, 2 Alaska Fed. 754 (C.C.A. 9th Cir. 1907).

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## 74 Am. Jur. 2d Tender § 14

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#### B. By and to Whom Made

## § 14. To whom made

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### West's Key Number Digest

West's Key Number Digest, [Tender](#)  7

### Forms

[Am. Jur. Legal Forms 2d § 246:5](#) (Person to whom tender is to be made)

A tender must be made to the creditor, or to someone having actual or apparent authority to act for the creditor.<sup>1</sup> In other words, a tender of payment, to be legal and effective, must be made to the payee or his or her representative at the proper time and place.<sup>2</sup>

An attorney's authority to collect his or her client's claims does not extend beyond his or her actual authorization by the client,<sup>3</sup> and a tender to the attorney for the obligee or person standing in his or her stead is insufficient.<sup>4</sup>

The tender of the full purchase price to the clerk of court before a contractual option is to expire constitutes a legal tender.<sup>5</sup> A tender to the original obligee is good as against his or her assignee if made in good faith and without notice of the assignment.<sup>6</sup>

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### Footnotes

<sup>1</sup> [Grand Lodge of Broth. of R.R. Trainmen v. Clark](#), 189 Ind. 373, 127 N.E. 280, 18 A.L.R. 1190 (1920); [Johnston v. Austin](#), 748 P.2d 1084 (Utah 1988).

- 2 Samaddar v. Jones & Jones Agency, Inc., 766 N.E.2d 1275 (Ind. Ct. App. 2002).  
3 Am. Jur. 2d, Attorneys at Law §§ 147 to 152.  
4 Massachusetts Bonding & Ins. Co. v. Vance, 1918 OK 372, 74 Okla. 261, 180 P. 693, 15 A.L.R. 981 (1919).  
5 Beckworth v. Beckworth, 255 Ga. 241, 336 S.E.2d 782 (1985).  
As to payment into court, see §§ 26 to 32.  
6 Gunby v. Ingram, 57 Wash. 97, 106 P. 495 (1910).

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## 74 Am. Jur. 2d Tender III C Refs.

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### III. Requisites and Sufficiency

#### C. Time and Place

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  8, 9

### A.L.R. Library

A.L.R. Index, Tender

West's A.L.R. Digest, [Tender](#)  8, 9

### Forms

[Am. Jur. Legal Forms 2d § 246:6](#)

[Am. Jur. Pleading and Practice Forms, Tender §§ 7, 20](#)

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## 74 Am. Jur. 2d Tender § 15

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### Tender

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### III. Requisites and Sufficiency

#### C. Time and Place

## § 15. Time

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### West's Key Number Digest

West's Key Number Digest, [Tender](#)  9

### A.L.R. Library

[Timeliness of tender or offer of return of consideration for release or compromise, required as condition of setting it aside, 53 A.L.R.2d 757](#)

### Forms

[Am. Jur. Legal Forms 2d § 246:6](#) (Contractual provision—Time and place of tender)

[Am. Jur. Pleading and Practice Forms, Tender § 7](#) (Notice—To debtor—Refusal of tender—Tender untimely made)

[Am. Jur. Pleading and Practice Forms, Tender § 20](#) (Answer—Defense—Untimely tender by plaintiff)

Where a tender at or within a specified time is a condition precedent to the acquisition of a right, the tender must be made at or within such specified time or the right will not be acquired.<sup>1</sup> Under a contract authorizing a tender "until" a specified day, a tender made on that day is sufficient where the preceding day is a holiday and a statute allows an additional day for performance.<sup>2</sup> The debtor is entitled to a reasonable time to procure the required legal tender where his or her tender, otherwise

sufficient, is refused because not made in a legal tender.<sup>3</sup> An unreasonable delay in making the tender will render it of no avail and will justify its refusal.<sup>4</sup>

After a suit is brought a tender cannot be made and be pleaded as such; the defendant must move the court for leave to deposit with the court so much as he or she admits to be due, together with all accrued costs, and the money may be brought in on the court's order and the amount struck from the complaint.<sup>5</sup> Accordingly, where the possessor of an automobile removed the vehicle from the jurisdiction of the trial court subsequent to the time when an action of the surety on a bank loan against the possessor to impose a constructive trust on the automobile was commenced and service was obtained on her, the possessor removed the automobile at her own peril and the tender to the surety in another state was legally insufficient, and thus, the surety could not be required to accept delivery in the other state within 30 days of the entry of the order.<sup>6</sup>

Generally, the rules in equity as to the time for a tender are substantially the same as at law, but they are usually greatly relaxed in their application in equity;<sup>7</sup> it is enough that the debtor is ready and willing, and offers, at the time specified, and even that he or she is ready and willing at the time suit is brought unless his or her rights have been lost by laches and that he or she offers to perform in his or her pleading. The plaintiff's performance will be provided for in the decree, and his or her previous neglect will only affect his or her right to costs.<sup>8</sup>

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#### Footnotes

- 1 [Schaeffer v. Coldren](#), 237 Pa. 77, 85 A. 98 (1912).
- 2 [Stanley v. Pilker](#), 40 S.D. 403, 167 N.W. 393 (1918).
- 3 [Simmons v. Swan](#), 275 U.S. 113, 48 S. Ct. 52, 72 L. Ed. 190 (1927); [Vick v. Howard](#), 136 Va. 101, 116 S.E. 465, 31 A.L.R. 240 (1923).
- 4 [In Union Ins. Co. v. Billman](#), 33 Ohio C.D. 27, 1909 WL 1240 (Ohio Cir. Ct. 1909), [aff'd](#), 82 Ohio St. 451, 92 N.E. 1125 (1910).
- 5 [Kolling v. Martin](#), 109 Ind. App. 184, 33 N.E.2d 808 (1941); [Pittman v. Fort Worth Warehouse & Storage Co.](#), 258 S.W. 1105 (Tex. Civ. App. Fort Worth 1923), writ dismissed w.o.j., (Oct. 29, 1924).
- 6 [Kansas Bankers Sur. Co. v. Scott](#), 225 Kan. 200, 589 P.2d 575 (1979).
- 7 [Bateman v. Hopkins](#), 157 N.C. 470, 73 S.E. 133 (1911).
- 8 [Bateman v. Hopkins](#), 157 N.C. 470, 73 S.E. 133 (1911).

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## 74 Am. Jur. 2d Tender § 16

American Jurisprudence, Second Edition | May 2021 Update

### Tender

Romualdo P. Eclavea, J.D.

### III. Requisites and Sufficiency

#### C. Time and Place

## § 16. Time—Before maturity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  9

In the absence of any waiver by the creditor of his or her right to insist on a strict compliance with the contract, a debtor has no right to pay his or her debt before maturity,<sup>1</sup> and so, a tender before maturity is not effectual in any way.<sup>2</sup> However, this rule does not apply where there has been a waiver of the creditor's right to insist that payment be deferred until the time specified in the obligation.<sup>3</sup> Under the foregoing general rule, a tender of the whole amount of the purchase money for property before it is due, under a contract by which a part is to be paid in interest-bearing notes, is not a proper tender of performance of the contract.<sup>4</sup> One who sets up as a defense to an action in ejectment that the deed under which the plaintiff claims is in fact a mortgage is not bound to tender the amount of the debt where it is not yet due.<sup>5</sup>

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### Footnotes

- 1 [Pyross v. Fraser](#), 82 S.C. 498, 64 S.E. 407 (1909); [Peryer v. Pennock](#), 95 Vt. 313, 115 A. 105, 17 A.L.R. 863 (1921); [Pedersen v. Fisher](#), 139 Wash. 28, 245 P. 30 (1926).
- 2 [Hanson v. Fox](#), 155 Cal. 106, 99 P. 489 (1909); [Pyross v. Fraser](#), 82 S.C. 498, 64 S.E. 407 (1909); [Peryer v. Pennock](#), 95 Vt. 313, 115 A. 105, 17 A.L.R. 863 (1921).
- 3 [Doering v. Schneider](#), 74 Ind. App. 294, 128 N.E. 936 (1920).
- 4 [Pedersen v. Fisher](#), 139 Wash. 28, 245 P. 30 (1926).
- 5 [Dickens v. Heston](#), 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933).

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## 74 Am. Jur. 2d Tender § 17

American Jurisprudence, Second Edition | May 2021 Update

### Tender

Romualdo P. Eclavea, J.D.

### III. Requisites and Sufficiency

#### C. Time and Place

## § 17. Time—After maturity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  9

In case of money demands where the amount is liquidated, or capable of being made so by mere computation, and the damages are merely the interest, a tender may be made after default at any time before an action is brought.<sup>1</sup> However, where a default in payment on the due date operates of itself to vest in the creditor rights that he or she did not possess before that time, then the debtor cannot by making a tender overcome the conditions that have arisen from his or her default.<sup>2</sup> If a payment on a certain date is essential to the acquisition of rights by the one making the tender, he or she cannot after that time make a tender that will nullify his or her default.<sup>3</sup> A tender may be legally made after the maturity of a debt, but its only effect is to prevent the acquisition of any further rights on the part of the creditor and not to deprive him or her of what the law has already conferred on him or her.<sup>4</sup> However, the tender of the balance due under a contract by a defaulting purchaser who has not received notice that the vendor elects to proceed under any of its options upon default will be deemed a sufficient tender when the purchaser places on deposit to the vendor's order a cashier's check in the total amount due under the contract.<sup>5</sup>

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### Footnotes

- 1 [Hawkins v. Fuller](#), 116 Or. 433, 240 P. 549 (1925).
- 2 [Damet v. Aetna Life Ins. Co.](#), 1919 OK 71, 72 Okla. 122, 179 P. 760, 5 A.L.R. 434 (1919).
- 3 [Thompson v. Coe](#), 96 Conn. 644, 115 A. 219, 17 A.L.R. 1233 (1921).
- 4 [McClellan v. Davis](#), 45 Idaho 541, 263 P. 1002 (1928); [Golo Slipper Co. v. Grossman](#), 189 N.Y.S. 91 (App. Term 1921).
- 5 [Hansen v. Christensen](#), 545 P.2d 1152 (Utah 1976) (abrogated on other grounds by, [Johnston v. Austin](#), 748 P.2d 1084 (Utah 1988)).

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## 74 Am. Jur. 2d Tender § 18

American Jurisprudence, Second Edition | May 2021 Update

### Tender

Romualdo P. Eclavea, J.D.

### III. Requisites and Sufficiency

#### C. Time and Place

## § 18. Place

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  8

If the debtor is ready at the time and place designated in a contract for payment, and the creditor does not attend, the result is the same as if an actual tender had been made.<sup>1</sup> The same result follows where the contract calls for tender at a designated bank, to which the tender is made and refused.<sup>2</sup>

Generally, when no place of payment is fixed by the contract, a tender may be made in the state or country where the contract was made.<sup>3</sup> When the creditor is in the state, and no place of payment is fixed by law or by the contract of the parties, the debtor must find the creditor and tender payment.<sup>4</sup> If a creditor is absent from the state and the debtor does all in his or her power to make a tender on the due date, the creditor cannot afterwards object that no tender was made.<sup>5</sup> A payee of a note has an obligation or duty to place himself or herself in a position to accept payment when the note matures and at the place at which it is to be paid.<sup>6</sup>

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### Footnotes

- <sup>1</sup> [Greenwade v. Williams](#), 281 S.W.2d 707 (Ky. 1955) (overruled in part on other grounds by, [Com., Dept. of Highways v. Barker](#), 379 S.W.2d 481 (Ky. 1964)).
- <sup>2</sup> [Gulf Production Co. v. Perry](#), 51 S.W.2d 1107 (Tex. Civ. App. Texarkana 1932), writ refused, (Nov. 28, 1932).
- <sup>3</sup> [Larsen v. Sjogren](#), 67 Wyo. 447, 226 P.2d 177 (1951).
- <sup>4</sup> [Berley & Kyzer v. Columbia, N. & L.R. Co.](#), 82 S.C. 232, 64 S.E. 397 (1909).
- <sup>5</sup> [Loughney v. Quigley](#), 279 Pa. 396, 124 A. 84 (1924); [Stansbury v. Embrey](#), 128 Tenn. 103, 158 S.W. 991 (1913).

6 [Greenwade v. Williams, 281 S.W.2d 707 \(Ky. 1955\)](#) (overruled in part on other grounds by, [Com., Dept. of Highways v. Barker, 379 S.W.2d 481 \(Ky. 1964\)](#)).

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## 74 Am. Jur. 2d Tender III D Refs.

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### Tender

Romualdo P. Eclavea, J.D.


### III. Requisites and Sufficiency

#### D. Medium and Amount

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  [11](#), [12\(1\)](#), [12\(2\)](#)

### A.L.R. Library

A.L.R. Index, Tender

West's A.L.R. Digest, [Tender](#)  [11](#), [12\(1\)](#), [12\(2\)](#)

### Forms

[Am. Jur. Legal Forms 2d § 246:14](#)

[Am. Jur. Pleading and Practice Forms, Tender §§ 14, 21](#)

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## 74 Am. Jur. 2d Tender § 19

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### Tender

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### III. Requisites and Sufficiency

#### D. Medium and Amount

## § 19. Medium

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  11

### Forms

[Am. Jur. Legal Forms 2d § 246:14](#) (Contractual provision—Check as sufficient tender)

[Am. Jur. Pleading and Practice Forms, Tender § 14](#) (Complaint, petition or declaration—Tender offered in improper medium of payment)

Although it is sometimes stated that in the absence of an agreement between the parties expressing or plainly indicating a contrary intent, the sole medium of payment is money, or that which the law has declared shall pass as the legal equivalent for the payment of debts,<sup>1</sup> and this must necessarily be the controlling rule as to a tender since a tender, upon acceptance, operates to pay or discharge the debt or obligation.<sup>2</sup> Nevertheless, some jurisdictions do not require that the tender be made in cash unless so demanded by the creditor.<sup>3</sup> Accordingly, in a proceeding challenging the judicial sale of realty at a mortgage foreclosure, the tender of a personal check has been held insufficient to effect a redemption where the parties had previously stipulated that the former owners could redeem the property only upon the payment "by cash or in certified funds" of the principal plus interest; the tender of a personal check whether or not drawn upon a trust or escrow account is at best a conditional payment until the conclusion of the "settlement" process.<sup>4</sup>

Generally, the tender must be in a form acceptable to the creditor.<sup>5</sup> Thus, a personal check is usually regarded as a "tender" of money.<sup>6</sup> A statute providing for the payment of money into court does not affect the law with respect to a legal tender in

payment of the purchase price of real estate, or excuse the debtor from making the tender in money, that being the stipulation of the contract.<sup>7</sup>

Under some circumstances, the making of a tender in a medium that the other party is not bound to accept does not discharge the debtor from his or her contract until a reasonable time has elapsed in which to make a proper tender.<sup>8</sup> Under other circumstances, however, the seller or creditor need not allow time for the purchaser or debtor to make another tender.<sup>9</sup>

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#### Footnotes

- 1 [Am. Jur. 2d, Payment § 21.](#)
- 2 [As to what constitutes money, see Am. Jur. 2d, Money §§ 1, 2.](#)
- 3 [§ 33.](#)
- 4 [U.S. v. Allen, 699 F.2d 1117 \(11th Cir. 1983\) \(applying Georgia law\); Lyon v. Willie, 288 N.W.2d 884 \(Iowa 1980\) \(when a tender is to be made in cash, the form of payment is not limited to coin or currency unless the parties have so agreed\); Graff v. Burnett, 226 Neb. 710, 414 N.W.2d 271 \(1987\).](#)
- 5 [Hudgins v. Florida Federal Sav. and Loan Ass'n, 399 So. 2d 990 \(Fla. Dist. Ct. App. 5th Dist. 1981\).](#)
- 6 [Gause v. C.T. Management, Inc., 637 A.2d 434 \(D.C. 1994\) \(applying District of Columbia law\).](#)
- 7 [Lilly Court LLC v. Lee, 198 Or. App. 321, 108 P.3d 642 \(2005\).](#)
- 8 [Vick v. Howard, 136 Va. 101, 116 S.E. 465, 31 A.L.R. 240 \(1923\).](#)
- 9 [Skinner v. Stone, 144 Ark. 353, 222 S.W. 360, 11 A.L.R. 808 \(1920\); Compton v. Weber, 296 Ill. 412, 129 N.E. 764 \(1921\); Farris v. Ferguson, 146 Tenn. 498, 242 S.W. 873, 23 A.L.R. 624 \(1922\).](#)
- 10 [Burden v. Elling State Bank, 76 Mont. 24, 245 P. 958, 46 A.L.R. 906 \(1926\).](#)

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## 74 Am. Jur. 2d Tender § 20

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### Tender

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### III. Requisites and Sufficiency

#### D. Medium and Amount

## § 20. Amount

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  12(1), 12(2)

### A.L.R. Library

[Creditor's failure to disclose correct amount due as affecting sufficiency of debtor's tender of amount which debtor believes to be due, but which is less than amount actually due, 82 A.L.R.3d 1178](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Tender § 21](#) (Answer—Denying amount of plaintiff's demand and alleging tender of proper amount)

The amount offered by the debtor to his or her creditor must be at least equal to the whole amount then due or accrued on the debt or obligation to constitute an effectual tender,<sup>1</sup> and an offer of a part of the amount due does not avail as a tender.<sup>2</sup> While it is generally true that to constitute a valid tender the tender must offer a specific amount, such amount need not be beyond reasonable dispute.<sup>3</sup> A tender is adequate to save the tenderer's rights where the amount tendered is the maximum amount that might be found due from the tenderer in any possible circumstances.<sup>4</sup>

Tendering more than the amount due without demanding change is a good tender;<sup>5</sup> however, a tender coupled with a demand for change as a precedent condition to giving up the money tendered is not good.<sup>6</sup>

Generally, a tender must include everything to which the creditor is entitled, and a tender of any sum that is less is nugatory and ineffective as a tender.<sup>7</sup> It must include interest due,<sup>8</sup> costs then due or accrued,<sup>9</sup> and attorney's fees to which the creditor has become entitled by force of the agreement of the parties as by commencement of suit or otherwise.<sup>10</sup>

It is the duty of the debtor to make sure that his or her tender is sufficient in amount, and ordinarily, it is immaterial that he or she did not know the correct amount or believed that his or her tender was adequate in amount.<sup>11</sup> This rule applies to render a deficient tender ineffectual where the debtor not only neglects to demand disclosure of the amount by his or her creditor but takes a position that would have made such a disclosure useless.<sup>12</sup> However, if a debtor requests of a creditor a statement of the balance owing on his or her account, the creditor being in sole possession of that information, and the creditor either neglects or refuses to disclose the correct amount owing, the debtor's tender of what he or she believes, in good faith, is owing is deemed sufficient even if it is a smaller amount than that actually owed.<sup>13</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Nothing short of the full amount due the creditor is sufficient to constitute a valid tender under California law, and the debtor must at his peril offer the full amount. [West's Ann.Cal.Civ.Code § 1485](#). [Herrejon v. Ocwen Loan Servicing, LLC](#), 980 F. Supp. 2d 1186 (E.D. Cal. 2013).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Gaffney v. Downey Savings & Loan Assn.](#), 200 Cal. App. 3d 1154, 246 Cal. Rptr. 421 (3d Dist. 1988); [Gause v. C.T. Management, Inc.](#), 637 A.2d 434 (D.C. 1994); [River Val. Cartage Co. v. Hawkeye-Security Ins. Co.](#), 17 Ill. 2d 242, 161 N.E.2d 101, 76 A.L.R.2d 978 (1959); [Allied Reserve Life Ins. Co. of Okl. City v. Baker](#), 1959 OK 19, 337 P.2d 747 (Okla. 1959); [Equitable Life Assur. Soc. of U.S. v. Boothe](#), 160 Or. 679, 86 P.2d 960 (1939); [Elliott v. Dew](#), 264 S.C. 40, 212 S.E.2d 421 (1975); [Timpanogos Highlands, Inc. v. Harper](#), 544 P.2d 481 (Utah 1975).
- 2 [Midwest Federal Sav. and Loan Ass'n of Minot v. Kouba](#), 335 N.W.2d 780, 40 A.L.R.4th 338 (N.D. 1983); [Equitable Life Assur. Soc. of U.S. v. Boothe](#), 160 Or. 679, 86 P.2d 960 (1939); [Elliott v. Dew](#), 264 S.C. 40, 212 S.E.2d 421 (1975).  
As to trifling deficiencies, see § 21.
- 3 [F.H.T., Inc. v. Feuerhelm](#), 211 Neb. 860, 320 N.W.2d 772 (1982).
- 4 [Santa Fe Pac. R. Co. v. Lane](#), 244 U.S. 492, 37 S. Ct. 714, 61 L. Ed. 1275 (1917).
- 5 [Louisville & N.R. Co. v. Cottengim](#), 31 Ky. L. Rptr. 871, 104 S.W. 280 (Ky. 1907).
- 6 [Louisville & N.R. Co. v. Cottengim](#), 31 Ky. L. Rptr. 871, 104 S.W. 280 (Ky. 1907).
- 7 [Brannon v. Cole](#), 40 Ala. App. 222, 110 So. 2d 645 (1959); [River Val. Cartage Co. v. Hawkeye-Security Ins. Co.](#), 17 Ill. 2d 242, 161 N.E.2d 101, 76 A.L.R.2d 978 (1959); [Friedman v. Wisconsin Acceptance Corp.](#), 192 Wis. 58, 210 N.W. 831, 53 A.L.R. 758 (1926) (in replevin to recover an automobile seized by a lender for default in payments secured thereon, the tender must include not only the amount due on the loan but

also what the lender advanced under the terms of the contract to pay the premiums for insurance upon the car and the life and health of the borrower).

8 River Val. Cartage Co. v. Hawkeye-Security Ins. Co., 17 Ill. 2d 242, 161 N.E.2d 101, 76 A.L.R.2d 978 (1959); Greenwade v. Williams, 281 S.W.2d 707 (Ky. 1955) (overruled in part on other grounds by, Com., Dept. of Highways v. Barker, 379 S.W.2d 481 (Ky. 1964)); Golo Slipper Co. v. Grossman, 189 N.Y.S. 91 (App. Term 1921); Ingold v. Phoenix Assur. Co., 230 N.C. 142, 52 S.E.2d 366, 8 A.L.R.2d 1439 (1949).

As to the sufficiency of tender to stop running of interest, see § 38.

9 Brannon v. Cole, 40 Ala. App. 222, 110 So. 2d 645 (1959); River Val. Cartage Co. v. Hawkeye-Security Ins. Co., 17 Ill. 2d 242, 161 N.E.2d 101, 76 A.L.R.2d 978 (1959).

10 Guilford v. Oien, 141 P.2d 464 (Cal. App. 1st Dist. 1943), hearing dismissed, (Apr. 17, 1944).

11 Wood v. Howland, 127 Iowa 394, 101 N.W. 756 (1904); Greenwade v. Williams, 281 S.W.2d 707 (Ky. 1955) (overruled in part on other grounds by, Com., Dept. of Highways v. Barker, 379 S.W.2d 481 (Ky. 1964)).

12 Krauss v. Potts, 1916 OK 451, 53 Okla. 379, 156 P. 1162, 5 A.L.R. 1213 (1916).

13 National Labor Rel. Bd. v. Aluminum Wkrs. Int. Union, Local No. 135, AFL, 230 F.2d 515 (7th Cir. 1956); Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775 (1951); Ford Motor Credit Co. v. Goings, 1974 OK CIV APP 28, 527 P.2d 603, 82 A.L.R.3d 1168 (Ct. App. Div. 2 1974); Elliott v. Dew, 264 S.C. 40, 212 S.E.2d 421 (1975).

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## 74 Am. Jur. 2d Tender § 21

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### Tender

Romualdo P. Eclavea, J.D.

### III. Requisites and Sufficiency

#### D. Medium and Amount

## § 21. Amount—Trivial deficiencies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  12(2)

Ordinarily, the fact that the deficiency in the amount of a tender is small or even trivial does not make the tender a valid one, at least if the amount is large enough to be discharged by the current coin of the country,<sup>1</sup> although there are decisions to the contrary or in which the courts have ignored petty deficiencies.<sup>2</sup>

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### Footnotes

- <sup>1</sup> [City of St. Louis v. Senter Commission Co.](#), 343 Mo. 1075, 124 S.W.2d 1180 (1938); [Duke v. Pugh](#), 218 N.C. 580, 11 S.E.2d 868 (1940); [Bell v. Riggs](#), 1912 OK 446, 34 Okla. 834, 127 P. 427 (1912).
- <sup>2</sup> [Graves v. Burch](#), 26 Wyo. 192, 181 P. 354, 5 A.L.R. 1216 (1919).

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## 74 Am. Jur. 2d Tender III E Refs.

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### Tender

Romualdo P. Eclavea, J.D.

### III. Requisites and Sufficiency

#### E. Conditions

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  14(1) to 14(5)

### A.L.R. Library

A.L.R. Index, Tender

West's A.L.R. Digest, [Tender](#)  14(1) to 14(5)

### Forms

[Am. Jur. Legal Forms 2d §§ 246:7 to 246:9](#)

[Am. Jur. Pleading and Practice Forms, Tender § 15](#)

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## 74 Am. Jur. 2d Tender § 22

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### Tender

Romualdo P. Eclavea, J.D.

### III. Requisites and Sufficiency

#### E. Conditions

## § 22. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  14(1)

### Forms

[Am. Jur. Legal Forms 2d § 246:7](#) (Contractual provision—Full and unconditional tender)

[Am. Jur. Legal Forms 2d § 246:8](#) (Contractual provision—Conditional tender)

[Am. Jur. Pleading and Practice Forms, Tender § 15](#) (Complaint, petition or declaration—Allegation—Tender offered on conditions other than those binding creditor)

A "tender" is an offer of payment that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist.<sup>1</sup> Indeed, where the condition is one that the debtor has the right to insist on, a tender made subject to that condition is valid.<sup>2</sup> In other words, to be valid as a tender, an offer to pay to satisfy an obligation must be unconditional.<sup>3</sup> Similarly stated, a tender requires an unconditional offer of payment in full.<sup>4</sup>

The universal rule is that a tender upon condition for which there is no foundation in the contractual relation between the parties is ineffective,<sup>5</sup> or as sometimes expressed, a tender must be without conditions to which the creditor can have a valid objection<sup>6</sup> or which will be prejudicial to his or her rights.<sup>7</sup> Thus, where there is nothing in the contractual relation between the parties to warrant it, an offer of the amount due on condition that a judgment will be assigned renders the tender ineffectual as such.<sup>8</sup> A tender of money that is not the debtor's to tender for the time being is conditional and ineffectual to constitute a tender.<sup>9</sup>

A tender is not made conditional merely by a demand that the other party fulfill its obligations under the contract.<sup>10</sup> Thus, where the performance of an act on the part of the creditor is to be precedent to or concurrent with the payment by the debtor, the latter may make his or her offer depend on the due performance of that condition.<sup>11</sup> In some jurisdictions, provisions to this effect are found in the statutes.<sup>12</sup>

A tender is not rendered conditional by reason of the fact that it is made under protest where no conditions are imposed and it is made involuntarily in that it is made under coercion of law for the purpose of saving the debtor's rights.<sup>13</sup> A tender by the debtor of the amount due on a debt, which requires nothing of the creditor except his or her acceptance of the money, is not rendered conditional by the debtor's statement that he or she intends to sue the creditor for damages.<sup>14</sup>

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#### Footnotes

- 1 North Marion School Dist. No. 15 ex rel. Trejo v. Acstar Ins. Co., 206 Or. App. 593, 138 P.3d 876 (2006).
- 2 Plank v. Arban, 241 So. 2d 198 (Fla. Dist. Ct. App. 4th Dist. 1970); Decorah State Bank v. Zidlicky, 426 N.W.2d 388 (Iowa 1988); Millhollin v. Conveyor Co., 1998 MT 41, 287 Mont. 377, 954 P.2d 1163 (1998); City of Newark v. Block 86, Lot 30, 94 N.J. Super. 468, 228 A.2d 877 (Ch. Div. 1967).
- 3 Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 215 P.3d 457, 69 U.C.C. Rep. Serv. 2d 890 (2009), cert. denied, 130 S. Ct. 1512, 176 L. Ed. 2d 121 (2010); Drewitz v. Motorwerks, Inc., 706 N.W.2d 773 (Minn. Ct. App. 2005), aff'd in part, rev'd in part on other grounds, 728 N.W.2d 231 (Minn. 2007).
- 4 Gause v. C.T. Management, Inc., 637 A.2d 434 (D.C. 1994).
- 5 Bohler v. Callaway, 267 U.S. 479, 45 S. Ct. 431, 69 L. Ed. 745 (1925); Swanson v. Baldwin, 250 Iowa 342, 93 N.W.2d 740 (1958); Faulkner v. Smith, 747 S.W.2d 592 (Ky. 1988); Flynn v. Korneffel, 451 Mich. 186, 547 N.W.2d 249 (1996); Bellamah v. Schmider, 68 N.M. 247, 360 P.2d 656 (1961).
- 6 Gause v. C.T. Management, Inc., 637 A.2d 434 (D.C. 1994); Decorah State Bank v. Zidlicky, 426 N.W.2d 388 (Iowa 1988); Carpenter v. Riley, 234 Kan. 758, 675 P.2d 900 (1984); Flynn v. Korneffel, 451 Mich. 186, 547 N.W.2d 249 (1996); Bellamah v. Schmider, 68 N.M. 247, 360 P.2d 656 (1961); Himan v. King Bear Auto Service Centers, Inc., 62 A.D.2d 1010, 403 N.Y.S.2d 772 (2d Dep't 1978); Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975).
- 7 Cochran v. Griffith Energy Service, Inc., 191 Md. App. 625, 993 A.2d 153 (2010), cert. denied, 415 Md. 115, 999 A.2d 179 (2010) (a tender that contains a condition that would prejudice the creditor's rights is invalid); Dodge v. Galusha, 151 Neb. 753, 39 N.W.2d 539 (1949); Robins v. Mack International Motor Truck Corp., 113 N.J.L. 377, 174 A. 551 (N.J. Ct. Err. & App. 1934); Bellamah v. Schmider, 68 N.M. 247, 360 P.2d 656 (1961).
- 8 Rutherford v. McGee, 241 S.W. 629 (Tex. Civ. App. Fort Worth 1922).
- 9 Vernon Center State Bank v. Mangelsen, 166 Minn. 472, 208 N.W. 186, 48 A.L.R. 710 (1926); Dodge v. Galusha, 151 Neb. 753, 39 N.W.2d 539 (1949).
- 10 Decorah State Bank v. Zidlicky, 426 N.W.2d 388 (Iowa 1988).
- 11 Pittsburg Plate Glass Co. v. Leary, 25 S.D. 256, 126 N.W. 271 (1910); Rutherford v. McGee, 241 S.W. 629 (Tex. Civ. App. Fort Worth 1922).
- 12 Pittsburg Plate Glass Co. v. Leary, 25 S.D. 256, 126 N.W. 271 (1910).
- 13 Mutual Life Ins. Co. of New York v. Hilander, 403 S.W.2d 260 (Ky. 1966); Jaynes v. Heron, 46 N.M. 431, 130 P.2d 29, 142 A.L.R. 1191 (1942).
- 14 Mutual Life Ins. Co. of New York v. Hilander, 403 S.W.2d 260 (Ky. 1966); Smith, Wogan & Co. v. Bice, 1912 OK 501, 34 Okla. 294, 125 P. 456 (1912).

## 74 Am. Jur. 2d Tender § 23

American Jurisprudence, Second Edition | May 2021 Update

### Tender

Romualdo P. Eclavea, J.D.

### III. Requisites and Sufficiency

#### E. Conditions

## § 23. Demand for receipt or release

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  14(2)

### Forms

[Am. Jur. Legal Forms 2d § 246:9](#) (Contractual provision—Tender conditioned on receipt from obligee)

A demand by the debtor for a simple receipt, even for a receipt in full, is not an invalid condition where there is no dispute as to the amount due or the terms of the debt or obligation.<sup>1</sup> Also, where the debtor asks only for a receipt showing the amount of money paid, this is a condition to which the creditor has no right to object, for such a receipt bars none of his or her rights.<sup>2</sup> In some states, there are statutes providing in effect that a debtor has a right to require from his or her creditor a written receipt for any property delivered in performance of his or her obligation. Such a statute does not, however, change the common law so as to authorize a debtor to demand a receipt in full where there is a dispute as to the amount.<sup>3</sup> However, a tender of an amount that is less than the creditor claims is due to him or her is not effectual where coupled with conditions rendering its acceptance by the creditor an admission that no greater amount is due.<sup>4</sup> This rule applies as well where the tender is in an amount for the full amount of all claims as where it is not,<sup>5</sup> and whether or not the amount of money tendered is in full is a question that the creditor has the right to contest in every case.<sup>6</sup> The same rule has been applied where the debtor conditioned his or her tender with a demand for a full release.<sup>7</sup> Likewise, a debtor can acquire no rights from an offer of an amount accompanied by a demand for a receipt showing payment in excess of that actually tendered where such rights will accrue to him or her only upon tender of the full amount called for by the contract.<sup>8</sup>

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Footnotes

- 1 Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S.E. 707 (1911).
- 2 Gulf Production Co. v. Perry, 51 S.W.2d 1107 (Tex. Civ. App. Texarkana 1932), writ refused, (Nov. 28, 1932).
- 3 Pittsburg Plate Glass Co. v. Leary, 25 S.D. 256, 126 N.W. 271 (1910).
- 4 United Gas Pipe Line Co. v. Tyler Gas Service Co., 162 F. Supp. 496 (E.D. Tex. 1958); Smith v. School Dist. No. 64 of Marion County, 89 Kan. 225, 131 P. 557 (1913).
- 5 United Gas Pipe Line Co. v. Tyler Gas Service Co., 162 F. Supp. 496 (E.D. Tex. 1958).
- 6 United Gas Pipe Line Co. v. Tyler Gas Service Co., 162 F. Supp. 496 (E.D. Tex. 1958).
- 7 Harbaugh v. Ford Roofing Products Co., 281 S.W. 686 (Mo. 1925).
- 8 Rude v. Levy, 43 Colo. 482, 96 P. 560 (1908).

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## 74 Am. Jur. 2d Tender § 24

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### Tender

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### III. Requisites and Sufficiency

#### E. Conditions

## § 24. Demand for surrender or discharge of security or obligation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  14(4)

A tender conditioned by a demand for a surrender of the obligation or security falls within the same category as a tender conditioned by a receipt in full and in general is subject to the same rules. Where a tender in full is made of an obligation, the debtor has the right to demand a surrender of all securities, direct and collateral, that the creditor holds.<sup>1</sup>

A tender of the full amount due may be validly conditioned on the surrender of the paper, but such condition is invalid where the amount tendered is less than the full amount due.<sup>2</sup> It is sometimes provided by statute that if, under the law, the party tendering payment is entitled to any instrument or discharge, such as a discharge of lien, he or she is entitled to receive a written discharge to the extent of the amount paid.<sup>3</sup>

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### Footnotes

- 1 [City and County of Honolulu v. Kam](#), 48 Haw. 349, 402 P.2d 683 (1965); [Lovett v. Eastern Oil Co.](#), 68 W. Va. 667, 70 S.E. 707 (1911).
- 2 [Pittsburg Plate Glass Co. v. Leary](#), 25 S.D. 256, 126 N.W. 271 (1910).
- 3 [Pittsburg Plate Glass Co. v. Leary](#), 25 S.D. 256, 126 N.W. 271 (1910).

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## 74 Am. Jur. 2d Tender § 25

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### Tender

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### III. Requisites and Sufficiency

#### E. Conditions

## § 25. Acceptance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  17

A creditor must accept or reject a tender as it is made<sup>1</sup>—he or she cannot make his or her acceptance conditional or qualified by prescribing the terms of his or her acceptance.<sup>2</sup> Where a party to a contract mails a payment to the vendor without objection by the vendor, such mailing is a sufficient tender.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [City of St. Louis v. Senter Commission Co.](#), 343 Mo. 1075, 124 S.W.2d 1180 (1938).
- <sup>2</sup> [Heighe v. Sale of Real Estate](#), 164 Md. 259, 164 A. 671, 93 A.L.R. 81 (1933); [City of St. Louis v. Senter Commission Co.](#), 343 Mo. 1075, 124 S.W.2d 1180 (1938).
- <sup>3</sup> [Lent v. Towery](#), 271 Or. 41, 530 P.2d 77 (1975).

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## 74 Am. Jur. 2d Tender IV Refs.

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### Research References

#### West's Key Number Digest

West's Key Number Digest, [Tender](#)  18, 23.1 to 27

#### A.L.R. Library

A.L.R. Index, Tender

West's A.L.R. Digest, [Tender](#)  18, 23.1 to 27

#### Forms

[Am. Jur. Pleading and Practice Forms, Tender § 16](#)

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## 74 Am. Jur. 2d Tender § 26

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### Tender

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#### IV. Keeping Tender Good; Deposit in Court

### § 26. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Tender](#)  [18](#), [23.1](#), [24](#)

#### Forms

[Am. Jur. Pleading and Practice Forms, Tender § 16](#) (Complaint, petition or declaration—Allegation—Failure to keep tender good—Subsequent demand and refusal)

A tender, to be effectual, must be kept good and must at all times be ready for the creditor's acceptance.<sup>1</sup> This is good practice even though it may not be absolutely required.<sup>2</sup> In some situations, keeping a tender good is a matter of policy rather than of strict legal requirement; thus, ordinarily, a tender need not be kept good where it clearly appears that the tender, if made, will not be accepted.<sup>3</sup>

Even though a tender is required by law to be kept good by paying the money into court, the person to whom a tender is made waives the payment into court by going to trial without such payment being done<sup>4</sup> or by repossessing the property for which the debtor owed money.<sup>5</sup> Where the creditor's rights are fully protected, he or she cannot successfully complain that the tender was not kept good.<sup>6</sup> On the other hand, one tendering the amount admitted to be due under a contract cannot claim the benefit of the tender, where he or she fails to pay it into court as required by the rule of court, where there is a dispute as to the amount due.<sup>7</sup> The matter is regulated by statute in some jurisdictions.<sup>8</sup>

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Footnotes

- 1 [Grand Lodge of Broth. of R.R. Trainmen v. Clark](#), 189 Ind. 373, 127 N.E. 280, 18 A.L.R. 1190 (1920); [Automatic Equipment Co. v. Mohny](#), 295 Ky. 451, 174 S.W.2d 716 (1943).
- 2 [Cleveland, C. & St. L. Ry. Co. v. Anderson Tool Co.](#), 180 Ind. 453, 103 N.E. 102 (1913); [Burbank v. Paige](#), 52 Wyo. 383, 75 P.2d 387 (1938).
- 3 [Wagner v. Shoemaker](#), 29 Cal. App. 2d 654, 85 P.2d 229 (4th Dist. 1938); [Cleveland, C. & St. L. Ry. Co. v. Anderson Tool Co.](#), 180 Ind. 453, 103 N.E. 102 (1913); [Carmichael v. Rice](#), 49 N.M. 114, 158 P.2d 290, 159 A.L.R. 1072 (1945).
- 4 [Gayle Motor Co. v. Gray-Acree Motor Co.](#), 206 Ala. 586, 90 So. 334 (1921); [Cleveland, C. & St. L. Ry. Co. v. Anderson Tool Co.](#), 180 Ind. 453, 103 N.E. 102 (1913).
- 5 [Chesterton State Bank v. Coffey](#), 454 N.E.2d 1233 (Ind. Ct. App. 1983) (where the bank never notified the car buyers with respect to its repossession of their car, the buyers did not have to keep the tender open by making a payment into court).
- 6 [Andrews v. Hoeslich](#), 47 Wash. 220, 91 P. 772 (1907).
- 7 [Weigell v. Gregg](#), 161 Wis. 413, 154 N.W. 645 (1915).
- 8 [Vick v. Howard](#), 136 Va. 101, 116 S.E. 465, 31 A.L.R. 240 (1923).

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## 74 Am. Jur. 2d Tender § 27

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### Tender

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### IV. Keeping Tender Good; Deposit in Court

## § 27. Where tender is relied on defensively

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  18

As a general rule, where a tender is relied on merely defensively, it is not necessary that it must be kept good<sup>1</sup> or that the money be paid into court.<sup>2</sup> Ordinarily, therefore, where the tender is relied on as having extinguished or discharged a lien,<sup>3</sup> it is not essential to keep it good.<sup>4</sup>

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### Footnotes

- 1 [Automatic Equipment Co. v. Mohney](#), 295 Ky. 451, 174 S.W.2d 716 (1943); [Carmichael v. Rice](#), 49 N.M. 114, 158 P.2d 290, 159 A.L.R. 1072 (1945).  
As to the rules where tender is relied on as a basis for affirmative relief, see [§ 28](#).
- 2 [Karnes v. Barton](#), 272 S.W. 317 (Tex. Civ. App. Austin 1925).
- 3 [§ 41](#).
- 4 [Walker v. Houston](#), 215 Cal. 742, 12 P.2d 952, 87 A.L.R. 937 (1932); [Rice v. Vaughn](#), 107 Kan. 598, 193 P. 176 (1920); [C. I. T. Corp. v. Mitchell](#), 129 S.W.2d 339 (Tex. Civ. App. Beaumont 1939).

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## 74 Am. Jur. 2d Tender § 28

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### Tender

Romualdo P. Eclavea, J.D.

### IV. Keeping Tender Good; Deposit in Court

## § 28. Where tender is relied on as basis for affirmative action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  18

A tender must be kept good where the tender and its refusal are the basis of a suit for affirmative relief from an instrument or contract or from a threatened action thereunder.<sup>1</sup> The general rule does not apply where the effect of the tender is to discharge a lien,<sup>2</sup> and in such cases, the debtor may enforce his or her rights without keeping the tender good.<sup>3</sup> Generally, where a party has made a tender of money as a prerequisite to the enforcement of a right and that money is paid into court, title to that money does not pass to the opposing party, but remains in the party making the tender, subject to the final outcome of the suit, and if title to the tendered sum remains in the party seeking to enforce an affirmative right when it is paid into court, the title also remains with the party placing the money on deposit.<sup>4</sup>

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### Footnotes

- 1 [Rice v. Vaughn](#), 107 Kan. 598, 193 P. 176 (1920); [Automatic Equipment Co. v. Mohny](#), 295 Ky. 451, 174 S.W.2d 716 (1943).
- 2 [§ 41](#).
- 3 [Karnes v. Barton](#), 272 S.W. 317 (Tex. Civ. App. Austin 1925); [Thomas v. Seattle Brewing & Malting Co.](#), 48 Wash. 560, 94 P. 116 (1908).
- 4 [Heck & Paetow Claim Service, Inc. v. Heck](#), 93 Wis. 2d 349, 286 N.W.2d 831 (1980).

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## 74 Am. Jur. 2d Tender § 29

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### Tender

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### IV. Keeping Tender Good; Deposit in Court

## § 29. To stop interest, costs, or attorney's fees

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  18

Subject to exceptions recognized by courts of equity,<sup>1</sup> a tender must be kept good to stop interest,<sup>2</sup> costs,<sup>3</sup> or subsequently accruing attorney's fees.<sup>4</sup> In other words, the tender must be continuing to be effectual to operate as such a bar,<sup>5</sup> and this is particularly true where the tender does not bar the debt or obligation.<sup>6</sup> In some jurisdictions, the rule is embodied in statutes that provide that money tendered may be paid into court and thus operates to bar interest and costs.<sup>7</sup>

The effect of a tender is to arrest the running of interest and to relieve the debtor of liability for costs, but in order to have that effect, the tender must, in certain cases, be kept good, and where the debtor is subsequently sued and the tender is relied upon as a defense, it must be specially pleaded, and the plea must be accompanied by a profert in curia, or payment of the amount tendered into court.<sup>8</sup>

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### Footnotes

- <sup>1</sup> § 30.
- <sup>2</sup> *State v. Lex Associates*, 248 Conn. 612, 730 A.2d 38 (1999); *Forwood v. Magness*, 143 Md. 1, 121 A. 855 (1923); *Murray v. O'Brien*, 56 Wash. 361, 105 P. 840 (1909).
- <sup>3</sup> *Le Vine v. Whitehouse*, 37 Utah 260, 109 P. 2 (1910); *James Talcott, Inc. v. Cohen*, 226 Wis. 418, 275 N.W. 906, 113 A.L.R. 806 (1937).
- <sup>4</sup> § 39.
- <sup>5</sup> *Kroener v. Mutual Life Ins. Co. of New York*, 297 F. 612, 35 A.L.R. 1248 (C.C.A. 7th Cir. 1924).
- <sup>6</sup> *Kroener v. Mutual Life Ins. Co. of New York*, 297 F. 612, 35 A.L.R. 1248 (C.C.A. 7th Cir. 1924).
- <sup>7</sup> *Forwood v. Magness*, 143 Md. 1, 121 A. 855 (1923); *Sanborn v. Dentler*, 97 Wash. 149, 166 P. 62, 6 A.L.R. 749 (1917).

8                      [Cochran v. Griffith Energy Service, Inc.](#), 191 Md. App. 625, 993 A.2d 153 (2010), cert. denied, 415 Md. 115, 999 A.2d 179 (2010).

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## 74 Am. Jur. 2d Tender § 30

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### Tender

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### IV. Keeping Tender Good; Deposit in Court

## § 30. In equity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  24

There is no general rule in equity requiring that a tender must be "kept good" as that phrase is used in law; generally, the necessity of doing so depends on the circumstances and equities of the particular case.<sup>1</sup> Courts in equity that depart from the rule at law take the position, in effect, that in equity the matter must be decided on equitable principles alone and that in applying those principles, a tender will not be required to be kept good unless the interests of substantial justice demand it.<sup>2</sup> Under this rule, a tender need not be kept good in a suit in equity to bar additional interest where the plaintiff has notice that the debtor is ready, able, and willing to pay the money over to him or her whenever he or she demands it.<sup>3</sup> However, other courts apply the same rule in equity as that which prevails at law and require that a tender be kept good to prevent the running of interest or costs even though the suit is one in equity.<sup>4</sup> Ordinarily, the money tendered need not be paid into court upon the filing of the bill, but an averment of a readiness and willingness to bring the money into court and pay the same on the order of the court is sufficient.<sup>5</sup>

A tender or offer to do equity as a condition of equitable relief against an execution need not be kept good by an actual deposit in court of the money tendered.<sup>6</sup>

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### Footnotes

- 1 [Thompson v. Crains](#), 294 Ill. 270, 128 N.E. 508, 12 A.L.R. 931 (1920); [Perkins v. Public Service Co. of N.H.](#), 93 N.H. 459, 45 A.2d 210 (1945); [Bateman v. Hopkins](#), 157 N.C. 470, 73 S.E. 133 (1911).
- 2 [Thompson v. Crains](#), 294 Ill. 270, 128 N.E. 508, 12 A.L.R. 931 (1920).
- 3 [Thompson v. Crains](#), 294 Ill. 270, 128 N.E. 508, 12 A.L.R. 931 (1920).
- 4 [Le Vine v. Whitehouse](#), 37 Utah 260, 109 P. 2 (1910).
- 5 [Bowen v. Gerhold](#), 32 Ind. App. 614, 70 N.E. 546 (1904); [Le Vine v. Whitehouse](#), 37 Utah 260, 109 P. 2 (1910); [Murray v. O'Brien](#), 56 Wash. 361, 105 P. 840 (1909).

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## 74 Am. Jur. 2d Tender § 31

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### Tender

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### IV. Keeping Tender Good; Deposit in Court

## § 31. Requisites of keeping tender good

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  18

Just what will keep a tender good varies with the circumstances of the particular cases, and the authorities sometimes differ as to the effect on the tender of substantially similar circumstances.<sup>1</sup> Accordingly, no general rule of universal application can be stated, but it seems that a tender is kept good if the debtor retains or keeps in his or her possession or control or on deposit in some bank the money tendered or otherwise holds it available or ready to pay over to the creditor upon his or her willingness to accept it.<sup>2</sup>

In some jurisdictions, it is required that a tender must be kept good by paying the amount tendered into court.<sup>3</sup>

### CUMULATIVE SUPPLEMENT

#### Cases:

A proper tender of payment generally requires full payment of the debt due; and if the payment is refused, the tender must be kept open by paying the full amount into court. [Lunsford v. Deutsche Bank Trust Co. Americas as Trustee](#), 996 N.E.2d 815, 81 U.C.C. Rep. Serv. 2d 783 (Ind. Ct. App. 2013).

### [END OF SUPPLEMENT]

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#### Footnotes

<sup>1</sup> [Kroener v. Mutual Life Ins. Co. of New York](#), 297 F. 612, 35 A.L.R. 1248 (C.C.A. 7th Cir. 1924).



- 2 [Kroener v. Mutual Life Ins. Co. of New York](#), 297 F. 612, 35 A.L.R. 1248 (C.C.A. 7th Cir. 1924).
- 3 [Grand Lodge of Broth. of R.R. Trainmen v. Clark](#), 189 Ind. 373, 127 N.E. 280, 18 A.L.R. 1190 (1920);  
[Tomahawk Village Apartments v. Farren](#), 571 N.E.2d 1286 (Ind. Ct. App. 1991) (if tender is refused, it can  
only be kept open by paying the full amount due into court to be available to the party to whom the amount  
was tendered).

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## 74 Am. Jur. 2d Tender § 32

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### Tender

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### IV. Keeping Tender Good; Deposit in Court

## § 32. Necessity of payment into court with pleading

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  24

Whether payment into court must accompany a plea of tender depends upon the nature of the proceedings and also upon the local statutes; thus, where a tender extinguishes a right absolutely, it is not necessary that the tender be kept good or that the money be paid into court on a plea of tender.<sup>1</sup> On the other hand, if a debt or duty is not discharged by a tender and refusal, the tender must be pleaded with a profert in curia, for since the debt or duty continues, it is not enough for the party pleading the tender to plead a tender and refusal, but he or she must also bring the money, or other thing that has been tendered, into court.<sup>2</sup>

In some jurisdictions, it is provided by statute that a plea of the tender of money must be accompanied by payment into court.<sup>3</sup>

In equity, the weight of authority is that it is not necessary for the purchaser to pay the money into court at the time when he or she commences his or her suit; it is sufficient for him or her to plead a tender of the purchase money and to offer by his or her bill to bring in his or her money whenever the same is liquidated and he or she has a decree for performance.<sup>4</sup> Although the statutes imply the necessity of paying a tender into court in order to stop interest, the courts will apply, when necessary, the rules of equity to do equal justice between the parties.<sup>5</sup> Accordingly, where a defendant has gone into court averring willingness to pay all that is due, and making an unconditional tender that is refused, the plaintiff is not entitled to interest after the tender although the money was not paid into court.<sup>6</sup> Where the tender is of property, it is not necessary that the property be brought into court for the reason that the effect of the tender is to pass title in the property to the creditor.<sup>7</sup>

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### Footnotes

- <sup>1</sup> [James B. Drake & Sons v. Nickerson](#), 123 Me. 11, 121 A. 86 (1923).
- <sup>2</sup> [Forwood v. Magness](#), 143 Md. 1, 121 A. 855 (1923).

- 3                   Mann v. Sprout, 185 N.Y. 109, 77 N.E. 1018 (1906).  
4                   Cain v. Barsaloux, 299 Ill. 371, 132 N.E. 575 (1921); Bateman v. Hopkins, 157 N.C. 470, 73 S.E. 133 (1911).  
5                   Schulz v. Graham, 234 Ind. 243, 126 N.E.2d 1 (1955).  
6                   Murray v. O'Brien, 56 Wash. 361, 105 P. 840 (1909).  
7                   Gellert v. Bank of California, National Ass'n, 107 Or. 162, 214 P. 377 (1923).

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## 74 Am. Jur. 2d Tender V A Refs.

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### Tender

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[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  [19\(1\)](#), [19\(2\)](#), [20](#), [21](#)

### A.L.R. Library

A.L.R. Index, Tender

West's A.L.R. Digest, [Tender](#)  [19\(1\)](#), [19\(2\)](#), [20](#), [21](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Tender §§ 22, 23](#)

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## 74 Am. Jur. 2d Tender § 33

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### Tender

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### V. Operation and Effect

#### A. In General

## § 33. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  19(1), 19(2), 20, 21

The tender of payment is not the equivalent of actual payment itself.<sup>1</sup> A bona fide, legally sufficient tender by a debtor, even though refused by the creditor, does not operate to discharge or extinguish the principal debt or obligation.<sup>2</sup> However, it is operative as a discharge or extinguishment of those things that are accessorial and incidental to the principal obligation,<sup>3</sup> and prevents the addition of any further increment that would otherwise accrue to the unpaid obligation,<sup>4</sup> and ordinarily discharges from further operation any collateral undertakings that may have been given for the better security of the creditor.<sup>5</sup> A tender gives the right to performance from the other party in a contract or to an action for damages against the party;<sup>6</sup> thus, a tender may operate to discharge a contractual obligation.<sup>7</sup> The making of an unaccepted tender without payment of the amount into court does not warrant the court in dismissing the complaint.<sup>8</sup>

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### Footnotes

- 1 [State v. Lex Associates](#), 248 Conn. 612, 730 A.2d 38 (1999).
- 2 [State v. Lex Associates](#), 248 Conn. 612, 730 A.2d 38 (1999); [Kellos v. Parker-Sharpe, Inc.](#), 245 Ga. 130, 263 S.E.2d 138, 28 U.C.C. Rep. Serv. 266 (1980); [McFarland v. Christoff](#), 120 Ind. App. 416, 92 N.E.2d 555 (1950); [Oaks v. Hill](#), 182 Kan. 501, 322 P.2d 814 (1958); [Guaranty Bank v. Thompson](#), 632 S.W.2d 338, 33 U.C.C. Rep. Serv. 629 (Tex. 1982).
- 3 [McFarland v. Christoff](#), 120 Ind. App. 416, 92 N.E.2d 555 (1950); [State Farm Fire & Cas. Co. v. Guaranty Federal Sav. Bank, N.A.](#), 916 S.W.2d 635 (Tex. App. Austin 1996), writ denied, (Aug. 1, 1996).
- 4 [State v. Lex Associates](#), 248 Conn. 612, 730 A.2d 38 (1999); [Marrs v. Oregon Short Line Railroad Co.](#), 33 Idaho 785, 198 P. 468 (1921); [McFarland v. Christoff](#), 120 Ind. App. 416, 92 N.E.2d 555 (1950); [Bembridge](#)

v. Miller, 235 Or. 396, 385 P.2d 172 (1963) (the legal effect of a tender at common law is to cut off the tenderer's liability, other than for the debt, for damages and interests arising from nonpayment, and this effect arises because the debtor has done all that is required of him or her, and his or her liability should not be increased simply because the proffered sum is not accepted by the creditor); *Guaranty Bank v. Thompson*, 632 S.W.2d 338, 33 U.C.C. Rep. Serv. 629 (Tex. 1982); *Le Vine v. Whitehouse*, 37 Utah 260, 109 P. 2 (1910).  
5 *McFarland v. Christoff*, 120 Ind. App. 416, 92 N.E.2d 555 (1950).

6 *Guy F. Atkinson Co. of California and Subsidiaries v. C.I.R.*, 814 F.2d 1388 (9th Cir. 1987) (applying California law).

7 *Guy F. Atkinson Co. of California and Subsidiaries v. C.I.R.*, 814 F.2d 1388 (9th Cir. 1987) (applying California law).

8 *James Talcott, Inc. v. Cohen*, 226 Wis. 418, 275 N.W. 906, 113 A.L.R. 806 (1937).

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## 74 Am. Jur. 2d Tender § 34

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### Tender

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### V. Operation and Effect

#### A. In General

## § 34. Obligation payable in property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  [19\(1\)](#), [19\(2\)](#), [21](#)

The tender and refusal of specific chattels, or the equivalent thereof by separating and segregating the property, where the creditor does not attend, operate to discharge the debt and extinguish the relation of debtor and creditor.<sup>1</sup> Such tender and refusal vests the property in the chattels in the creditor.<sup>2</sup> When the tender is refused, the tenderer becomes a bailee, and it is his or her duty as such to take care of the property at the tenderee's expense, but when a tenderer wrongfully withholds property from its owner upon demand, the tenderee no longer bears the risk of the loss of the property, and if the tenderer allows the goods to be damaged, the debt still must be paid by the tenderer, and such debt may be recovered under the tort of conversion.<sup>3</sup>

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### Footnotes

- 1 [Maples v. Douglass](#), 205 Ala. 94, 87 So. 585 (1920); [Gellert v. Bank of California, National Ass'n](#), 107 Or. 162, 214 P. 377 (1923).
- 2 [Gellert v. Bank of California, National Ass'n](#), 107 Or. 162, 214 P. 377 (1923).
- 3 [Whalen v. Connelly](#), 621 N.W.2d 681 (Iowa 2000), as amended on denial of reh'g, (Jan. 31, 2001); [Smith v. Price](#), 1952 OK 258, 206 Okla. 659, 246 P.2d 359 (1952); [Gellert v. Bank of California, National Ass'n](#), 107 Or. 162, 214 P. 377 (1923).

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## 74 Am. Jur. 2d Tender § 35

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### V. Operation and Effect

#### A. In General

## § 35. Admission of indebtedness or obligation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  19(2)

The legal effect of a plea of tender is an irrebuttable admission of indebtedness to the extent of the tender<sup>1</sup> regardless of the final outcome of the action.<sup>2</sup> Thus, by tendering payment of fire hydrant rentals for a stated period, a municipality admits the existence of an obligation to that extent and the reasonable basis of the rental for the hydrants.<sup>3</sup> Also, where a buyer accepted the benefits of a sale conditioned upon a guarantee that the seller would receive full payment for the goods sold as well as a previous unpaid balance of \$21,000 admittedly owed by the buyer, and the buyer subsequently submitted checks for such goods and the previous balance, the seller's right to recover such \$21,000 has been deemed conclusively established.<sup>4</sup>

A deposit by the defendant into court of an amount that he or she admits to be due, together with accrued costs, made after the commencement of an action against him or her, even if technically different from a tender, has the same effect as a tender to admit that there is an amount due to the plaintiff and, in effect, admits the plaintiff's right of action as alleged but not the contract as alleged or the basic measure of recovery.<sup>5</sup> However, a tender of a certain amount in full, if not accepted in full, is not an admission that the amount is in any event due as a part of a larger indebtedness.<sup>6</sup>

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### Footnotes

- 1 [Oaks v. Hill](#), 182 Kan. 501, 322 P.2d 814 (1958); [Stallmaker v. Great Am. Ins. Co. of New York](#), 364 S.W.2d 620 (Mo. Ct. App. 1963); [James v. Hogan](#), 154 Neb. 306, 47 N.W.2d 847 (1951), opinion modified on other grounds, 154 Neb. 640, 48 N.W.2d 756 (1951).  
As to the effect of tender on judgment and the amount thereof, see § 40.
- 2 [Seid Pak Sing v. Barker](#), 122 Cal. App. 93, 10 P.2d 92 (3d Dist. 1932); [Knight v. Firemen's Ins. Co. of Newark, N.J.](#), 227 Mo. App. 426, 49 S.W.2d 682 (1932); [Mann v. Sprout](#), 185 N.Y. 109, 77 N.E. 1018 (1906).



- 3 East St. Louis & Interurban Water Co. v. City of Belleville, 360 Ill. 490, 196 N.E. 442, 103 A.L.R. 1155 (1935).
- 4 J & K Plumbing & Heating Co., Inc. v. International Tel. & Tel. Corp., 51 A.D.2d 638, 378 N.Y.S.2d 822 (3d Dep't 1976).
- 5 Sanborn v. Dentler, 97 Wash. 149, 166 P. 62, 6 A.L.R. 749 (1917).
- 6 Schreiber v. Pacific Coast Fire Ins. Co., 195 Md. 639, 75 A.2d 108, 20 A.L.R.2d 951 (1950).

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## 74 Am. Jur. 2d Tender § 36

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### Tender

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### V. Operation and Effect

#### A. In General

## § 36. Right to accelerate maturity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  19(1), 20, 21

Under a contract that provides that any default in the payment of the interest or an installment of the principal when due will give the obligee an option to declare the whole amount due, the general rule is that a tender of payment of the overdue principal or interest before the option to declare the whole debt due has been exercised cuts off the right to exercise the option.<sup>1</sup> This is so because the debt does not become due on the mere default in payment but by affirmative action by which the creditor makes it known to the debtor that he or she intends to declare the whole debt due.<sup>2</sup> The creditor is entitled to a reasonable time after default in which to exercise the option, but the option itself does not outlive the default.<sup>3</sup> Such acceleration stipulations should be so construed, if possible and consistent with the language employed, as to give the protection intended thereby to both the debtor and the creditor.<sup>4</sup>

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### Footnotes

- 1 [Moresi v. Far West Services, Inc.](#), 291 F. Supp. 586 (D. Haw. 1968); [Stansbury v. Embrey](#), 128 Tenn. 103, 158 S.W. 991 (1913); [Romero v. Schmidt](#), 15 Utah 2d 300, 392 P.2d 37 (1964).
- 2 [Romero v. Schmidt](#), 15 Utah 2d 300, 392 P.2d 37 (1964); [Weinberg v. Naher](#), 51 Wash. 591, 99 P. 736 (1909).
- 3 [Gunby v. Ingram](#), 57 Wash. 97, 106 P. 495 (1910); [Weinberg v. Naher](#), 51 Wash. 591, 99 P. 736 (1909).
- 4 [Clark v. Paddock](#), 24 Idaho 142, 132 P. 795 (1913).

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## 74 Am. Jur. 2d Tender § 37

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### Tender

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### V. Operation and Effect

#### A. In General

## § 37. Tender as precluding defenses, counterclaim, or setoff

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  19(1), 20, 21

A tender or payment into court admits liability on a debt or obligation at least to the extent of the amount tendered.<sup>1</sup> There is some confusion, however, as to whether this effect of a tender precludes a defendant from availing himself or herself of defenses to prevent further recovery or recovery even to the extent of the tender, some courts holding that the plaintiff is entitled to judgment in the amount of the tender at least.<sup>2</sup> Where the action is based upon a contract, the tender is an admission of liability to the amount of the tender only, and beyond that, the defendant may avail himself or herself of any defense to defeat a further recovery.<sup>3</sup> In actions founded on a tort, the tender has been held to be an admission of the tort, and only the amount of damages remains open.<sup>4</sup>

In some jurisdictions, the tender or payment into court is deemed an admission of a cause of action only as to the amount tendered, and the defendant may assert any defense that he or she has to prevent further recovery as long as such defense is not inconsistent with the admission of the original contract or cause of action.<sup>5</sup> Thus, a defendant cannot rely on a general denial,<sup>6</sup> but he or she may set up, despite his or her tender, payment beyond the amount tendered, or other defenses, even the statute of limitations.<sup>7</sup>

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### Footnotes

<sup>1</sup> § 35.

<sup>2</sup> § 40.

<sup>3</sup> *Palmer v. La Rault*, 51 Wash. 664, 99 P. 1036 (1909).

<sup>4</sup> *Wells v. Missouri-Edison Electric Co.*, 108 Mo. App. 607, 84 S.W. 204 (1904).

- 5                    [Hadden v. Fuqua](#), 194 Ga. 621, 22 S.E.2d 377 (1942) (a plea of tender did not prevent the defendant from relying upon his plea of res judicata for the purpose of defeating a recovery in excess of the sum tendered); [Republic Ins. Co. v. Highland Park Independent School District](#), 123 S.W.2d 784 (Tex. Civ. App. Dallas 1938), writ dismissed, 133 Tex. 545, 125 S.W.2d 270 (1939); [Palmer v. La Rault](#), 51 Wash. 664, 99 P. 1036 (1909).
- 6                    [Republic Ins. Co. v. Highland Park Independent School District](#), 123 S.W.2d 784 (Tex. Civ. App. Dallas 1938), writ dismissed, 133 Tex. 545, 125 S.W.2d 270 (1939).
- 7                    [Republic Ins. Co. v. Highland Park Independent School District](#), 123 S.W.2d 784 (Tex. Civ. App. Dallas 1938), writ dismissed, 133 Tex. 545, 125 S.W.2d 270 (1939).

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## 74 Am. Jur. 2d Tender § 38

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### Tender

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### V. Operation and Effect

#### A. In General

## § 38. Tender as stopping interest

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  19(1), 20, 21

### A.L.R. Library

[Rights as between vendor and vendee under land contract in respect of interest, 25 A.L.R.2d 951](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Tender § 23](#) (Answer—Tender followed by deposit of funds in creditor's name or in court to extinguish accrual of interest and costs)

A lawful, bona fide tender of the amount due stops the accrual of further interest.<sup>1</sup> In some jurisdictions, the rule is that a tender, to have this effect, must be kept good and must be continuing.<sup>2</sup> To stop the running of interest, the amount tendered must be sufficient to include the whole amount due from the debtor.<sup>3</sup> Only when a tender is unconditional will interest toll on an obligation, and for the tender to be unconditional, it must be the actual production of a sum not less than the amount due on a specific debt or obligation.<sup>4</sup>

In equity, a debtor who has been ready, able, and willing to pay whatever amount the court determined to whomever was entitled thereto, as shown by uncontradicted testimony, is not required to pay interest during the pendency of the suit.<sup>5</sup>

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Footnotes

- 1 [State v. Lex Associates](#), 248 Conn. 612, 730 A.2d 38 (1999); [In re Zach's Estate](#), 257 Iowa 234, 131 N.W.2d 484 (1964).
- 2 [§ 29](#).
- 3 [Morton v. Ansin](#), 129 So. 2d 177 (Fla. Dist. Ct. App. 3d Dist. 1961); [River Val. Cartage Co. v. Hawkeye-Security Ins. Co.](#), 17 Ill. 2d 242, 161 N.E.2d 101, 76 A.L.R.2d 978 (1959); [City of St. Louis v. Senter Commission Co.](#), 343 Mo. 1075, 124 S.W.2d 1180 (1938).
- 4 [Buffalo Ridge Corp. v. Lamar Advertising of South Dakota, Inc.](#), 2011 SD 4, 793 N.W.2d 809 (S.D. 2011).
- 5 [Niedermeyer, Inc. v. Fehl](#), 153 Or. 656, 57 P.2d 1086 (1936).

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## 74 Am. Jur. 2d Tender § 39

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### Tender

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### V. Operation and Effect

#### A. In General

## § 39. Tender as stopping costs, penalty, or attorney's fees

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  19(1), 20, 21

### Forms

[Am. Jur. Pleading and Practice Forms, Tender § 22](#) (Answer—Tender before suit as terminating plaintiff's right to costs)

Generally, a tender operates to stop the accrual of further costs.<sup>1</sup> In some jurisdictions, the matter is specifically regulated by statute.<sup>2</sup>

A timely tender, sufficient in amount, will relieve the tenderer from liability for a statutory penalty for not paying a wage claimant whose claim is proper, not excessive, and susceptible of exact ascertainment by simple computation.<sup>3</sup>

To prevent the recovery of attorney's fees, the actual tender must be made and not a mere offer of tender;<sup>4</sup> it must be a strict bona fide tender in the sense that the debtor then has money available to make it.<sup>5</sup> The tender must be in the full amount due the creditor,<sup>6</sup> and it must be made before the right to recover such fees has accrued by the terms of the agreement as by filing suit to enforce the debt.<sup>7</sup> However, the fact that the amount tendered is slightly less than what is in fact due does not prevent the disallowance of attorney's fees, if the defendant relies on the plaintiff's statement of the amount due, and the determination of the actual amount due is complicated because of the way payments have been made.<sup>8</sup> A tender of the amount due by the maker on a promissory note that is insufficient to release the collateral because of other indebtedness, where the right to hold

the collateral is disputed, relieves the maker from payment of the attorney's fees provided for in the note, although the surrender of the collateral is demanded as a condition of payment and is refused, if the tender is kept good by payment into court.<sup>9</sup>

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Footnotes

- 1 [Guaranty Bank v. Thompson](#), 632 S.W.2d 338, 33 U.C.C. Rep. Serv. 629 (Tex. 1982).
- 2 [Sanborn v. Dentler](#), 97 Wash. 149, 166 P. 62, 6 A.L.R. 749 (1917).
- 3 [Marrs v. Oregon Short Line Railroad Co.](#), 33 Idaho 785, 198 P. 468 (1921).
- 4 [Somerton State Bank v. Maxey](#), 22 Ariz. 365, 197 P. 892, 14 A.L.R. 1117 (1921).
- 5 [Horan v. Harrington](#), 130 Cal. 142, 62 P. 400 (1900); [Holmes v. Bates](#), 218 Miss. 233, 67 So. 2d 273 (1953).
- 6 [Holmes v. Bates](#), 218 Miss. 233, 67 So. 2d 273 (1953).
- 7 [Holmes v. Bates](#), 218 Miss. 233, 67 So. 2d 273 (1953); [Equitable Life Assur. Soc. of U.S. v. Boothe](#), 160 Or. 679, 86 P.2d 960 (1939).
- 8 [Graves v. Burch](#), 26 Wyo. 192, 181 P. 354, 5 A.L.R. 1216 (1919).
- 9 [Fourth Nat. Bank of Nashville v. Stahlman](#), 132 Tenn. 367, 178 S.W. 942 (1915).

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## 74 Am. Jur. 2d Tender § 40

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### Tender

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### V. Operation and Effect

#### A. In General

## § 40. Tender as affecting amount of judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  19(1), 20

In some jurisdictions, the creditor is entitled to have judgment entered against the debtor for the amount tendered with disbursements to the date of the tender, at least.<sup>1</sup> However, a defendant's plea of tender of amounts subsequently recovered in a suit on an insurance policy following an appraisal does not necessarily mean that the plaintiffs are entitled to a summary judgment for such amounts where the plaintiffs did not accept the appraisal but sought to set it aside, and therefore, it is not certain just what they would finally recover.<sup>2</sup>

In other courts, the rule is that, ordinarily, where the tender has been kept good by payment into court, judgment will be rendered only for the amount, if any, that the plaintiff recovers over and above the amount tendered.<sup>3</sup>

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### Footnotes

- <sup>1</sup> E.J. Struntz *Planing Mill Co. v. Paget*, 123 Or. 651, 263 P. 389 (1928).
- <sup>2</sup> *Schreiber v. Pacific Coast Fire Ins. Co.*, 195 Md. 639, 75 A.2d 108, 20 A.L.R.2d 951 (1950).
- <sup>3</sup> *Clarke v. Cowan*, 206 Mass. 252, 92 N.E. 474 (1910).

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## 74 Am. Jur. 2d Tender § 41

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### Tender

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### V. Operation and Effect

#### A. In General

## § 41. Tender as extinguishing lien or security

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  19(1), 20

As a general rule of law, where a person holds a lien on property, a tender by the owner of the property of the amount of the lien will discharge it.<sup>1</sup> This is the general rule as to a mechanic's lien.<sup>2</sup> However, if a defendant makes informal tenders to a plaintiff on the condition that they be accepted in full satisfaction of portions of the judgment they purport to represent, without including prejudgment interest, such tenders are, as a matter of law, not proper, and the plaintiff is under no obligation to accept them in this form.<sup>3</sup>

A workers' compensation insurance company does not lose the benefit of its statutory lien under the law of tender simply by exercising its right to reject a check from the claimant's attorney that it believed was insufficient to satisfy the lien.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Walker v. Houston](#), 215 Cal. 742, 12 P.2d 952, 87 A.L.R. 937 (1932).
- <sup>2</sup> [Am. Jur. 2d, Mechanics' Liens § 323](#).
- <sup>3</sup> [Am. Jur. 2d, Judgments § 820](#).
- <sup>4</sup> [In re Frost](#), 171 N.J. 308, 793 A.2d 699 (2002).

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## 74 Am. Jur. 2d Tender § 42

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### Tender

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### V. Operation and Effect

#### A. In General

## § 42. Receipt of money and acceptance of tender

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  20

When a debtor makes a written offer of payment, the debtor must have a good-faith intent to ascertain whether the creditor is willing to accept the performance that is offered, and if the creditor agrees to do so, the debtor is required to actually and timely perform and produce the payment.<sup>1</sup>

The mere receipt of the money tendered does not prevent the creditor from contending that more is due him or her,<sup>2</sup> but a defendant tendering money and paying it into court does so in full satisfaction and liquidation of the plaintiff's demand, and if accepted by the plaintiff, it must be so received, although he or she protests that more is due and declines to accept it as full payment, if the terms on which it was tendered are not waived by the defendant or modified by a rule of court.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [Malan v. Tipton](#), 349 Or. 638, 247 P.3d 1223 (2011).
- <sup>2</sup> [Clarke v. Cowan](#), 206 Mass. 252, 92 N.E. 474 (1910); [Pittsburg Plate Glass Co. v. Leary](#), 25 S.D. 256, 126 N.W. 271 (1910).
- <sup>3</sup> [Jonathan Turner's Sons v. Lee Gin & Machine Co.](#), 98 Tenn. 604, 41 S.W. 57 (1897).

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## 74 Am. Jur. 2d Tender V B Refs.

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### V. Operation and Effect

### B. Money Deposited in Court

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### West's Key Number Digest

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[Am. Jur. Pleading and Practice Forms, Tender § 11](#)

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## 74 Am. Jur. 2d Tender § 43

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### Tender

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### V. Operation and Effect

### B. Money Deposited in Court

## § 43. Generally; ownership

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  23.1, 26

### Forms

[Am. Jur. Pleading and Practice Forms, Tender § 11](#) (Notice—To creditor—Deposit by debtor of tender into court)

The payment of money into court as an unconditional tender passes the title to the money so paid irrevocably to the party to whom it is tendered<sup>1</sup> even though he or she does not accept the tender<sup>2</sup> or does not accept it until after judgment has gone against him or her.<sup>3</sup> It is not material whether the action is on a contract or in tort since in either case, the money paid into court by the debtor immediately becomes the property of the creditor and the voluntary act of the debtor operates as a final and irrevocable transfer from him or her of the money so tendered, and the custody of the law is the custody of the creditor.<sup>4</sup>

If the plaintiff goes on with the action and is nonsuited, or the verdict is against him or her, or is for a sum less than the amount tendered and paid into court, still, the defendant cannot take the money back, for it is not his or hers, but has passed irrevocably to his or her adversary.<sup>5</sup> If thereafter the fund is lost or stolen, the loss falls on the plaintiff, not on the defendant, who has no further interest in the money.<sup>6</sup> If, however, the money is not properly paid into court so as to become a fund of the court, the title is not deemed transferred to the plaintiff.<sup>7</sup>

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Footnotes

- 1 [Gardner v. State](#), 239 Miss. 856, 125 So. 2d 730 (1960); [Mann v. Sprout](#), 185 N.Y. 109, 77 N.E. 1018 (1906); [Kruse v. Blair](#), 127 Or. 393, 272 P. 265 (1928).
- 2 [Palm Beach Estates v. Croker](#), 106 Fla. 617, 143 So. 792 (1932); [Mann v. Sprout](#), 185 N.Y. 109, 77 N.E. 1018 (1906); [Kruse v. Blair](#), 127 Or. 393, 272 P. 265 (1928).
- 3 [Mann v. Sprout](#), 185 N.Y. 109, 77 N.E. 1018 (1906); [Kruse v. Blair](#), 127 Or. 393, 272 P. 265 (1928); [Republic Ins. Co. v. Highland Park Independent School District](#), 123 S.W.2d 784 (Tex. Civ. App. Dallas 1938), writ dismissed, 133 Tex. 545, 125 S.W.2d 270 (1939).
- 4 [Mann v. Sprout](#), 185 N.Y. 109, 77 N.E. 1018 (1906).
- 5 [Weinchel v. Adamic](#), 125 Colo. 235, 242 P.2d 219 (1952); [Mann v. Sprout](#), 185 N.Y. 109, 77 N.E. 1018 (1906).
- 6 [Phipps v. Watson](#), 108 Fla. 547, 147 So. 234 (1933); [Mann v. Sprout](#), 185 N.Y. 109, 77 N.E. 1018 (1906).
- 7 [Palm Beach Estates v. Croker](#), 106 Fla. 617, 143 So. 792 (1932).

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## 74 Am. Jur. 2d Tender § 44

American Jurisprudence, Second Edition | May 2021 Update

### Tender

Romualdo P. Eclavea, J.D.

### V. Operation and Effect

### B. Money Deposited in Court

## § 44. Withdrawal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  26

Money that has been tendered and then, without any order of the court, deposited in a bank or with a third person may be withdrawn where there has been no acceptance,<sup>1</sup> but where money tendered is deposited in court, the title thereto is transferred from the tenderer who deposits it to the other party,<sup>2</sup> and the court itself has no power to make an order in the same action that, in effect, retransfers the title<sup>3</sup> by permitting the debtor to withdraw the money.<sup>4</sup> The money, however, may be withdrawn on a consent order of the court or by a decree in equity.<sup>5</sup> Also, if by the terms of an order permitting a defendant to answer in a suit in equity the plaintiff is given leave to withdraw, the plaintiff may thereafter withdraw the money if he or she desires.<sup>6</sup> Withdrawal of money deposited in court is permissible as an essential condition precedent to the enforcement of an asserted right to affirmative relief.<sup>7</sup>

As an exception to the general rule that where money is paid into court by a defendant, on a plea of tender that denies all liability but states that the defendant is willing to pay the amount tendered for the purpose of ending the suit, there is merely an offer to buy peace, and where a verdict is rendered in favor of the defendant, the defendant may withdraw the amount paid into court.<sup>8</sup>

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### Footnotes

<sup>1</sup> [Mann v. Sprout](#), 185 N.Y. 109, 77 N.E. 1018 (1906); [Winn v. Krow](#), 1930 OK 333, 144 Okla. 110, 289 P. 756 (1930).

<sup>2</sup> [§ 43](#).

<sup>3</sup> [Mann v. Sprout](#), 185 N.Y. 109, 77 N.E. 1018 (1906).

4                   Palm Beach Estates v. Croker, 106 Fla. 617, 143 So. 792 (1932); Mann v. Sprout, 185 N.Y. 109, 77 N.E.  
1018 (1906); Winn v. Krow, 1930 OK 333, 144 Okla. 110, 289 P. 756 (1930).  
5                   Republic Ins. Co. v. Highland Park Independent School District, 123 S.W.2d 784 (Tex. Civ. App. Dallas  
1938), writ dismissed, 133 Tex. 545, 125 S.W.2d 270 (1939).  
6                   Levin v. Goodman, 107 N.J. Eq. 473, 153 A. 476, 73 A.L.R. 1278 (Ct. Err. & App. 1931); Winn v. Krow,  
1930 OK 333, 144 Okla. 110, 289 P. 756 (1930).  
7                   § 45.  
8                   Levin v. Goodman, 107 N.J. Eq. 473, 153 A. 476, 73 A.L.R. 1278 (Ct. Err. & App. 1931).

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## 74 Am. Jur. 2d Tender § 45

American Jurisprudence, Second Edition | May 2021 Update

### Tender

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### V. Operation and Effect

### B. Money Deposited in Court

## § 45. Withdrawal—Where affirmative relief is sought

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Tender](#)  26

Withdrawal is permissible where money is paid into court by a tenderer who is not acting defensively but deposits the money as a prerequisite to the enforcement of a right; title to money so deposited is not transferred to the other party.<sup>1</sup> Thus, where money is paid into court by a debtor seeking affirmative relief, and it is a prerequisite to obtaining it that he or she must tender to his or her adversary an amount due the latter, the title to such deposit does not pass to the other party, and the depositor may be permitted to withdraw it.<sup>2</sup>

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### Footnotes

- <sup>1</sup> [Gardner v. State](#), 239 Miss. 856, 125 So. 2d 730 (1960); [Levin v. Goodman](#), 107 N.J. Eq. 473, 153 A. 476, 73 A.L.R. 1278 (Ct. Err. & App. 1931); [Winn v. Krow](#), 1930 OK 333, 144 Okla. 110, 289 P. 756 (1930); [Heck & Paetow Claim Service, Inc. v. Heck](#), 93 Wis. 2d 349, 286 N.W.2d 831 (1980).
- <sup>2</sup> [Rumph v. Rister](#), 92 Ga. App. 29, 87 S.E.2d 447 (1955); [Cain v. Barsaloux](#), 299 Ill. 371, 132 N.E. 575 (1921); [Gardner v. State](#), 239 Miss. 856, 125 So. 2d 730 (1960); [Heck & Paetow Claim Service, Inc. v. Heck](#), 93 Wis. 2d 349, 286 N.W.2d 831 (1980).

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## 74 Am. Jur. 2d Tender VI Refs.

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### Research References

#### West's Key Number Digest

West's Key Number Digest, [Tender](#)  22, 28, 29

#### A.L.R. Library

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#### Forms

[Am. Jur. Pleading and Practice Forms, Tender §§ 13, 25, 26](#)

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## 74 Am. Jur. 2d Tender § 46

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### Tender

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### VI. Pleading and Proof

## § 46. Pleading

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### West's Key Number Digest

West's Key Number Digest, [Tender](#)  22

### Forms

[Am. Jur. Pleading and Practice Forms, Tender § 13](#) (Complaint, petition or declaration—Tender of purchase price and demand for delivery of goods)

[Am. Jur. Pleading and Practice Forms, Tender § 25](#) (Answer—Defense—Payment of part and tender of remainder of plaintiff's demand)

[Am. Jur. Pleading and Practice Forms, Tender § 26](#) (Answer—Defense—Tender by written offer to pay)

Generally, the tender must be pleaded where it is relied on, either defensively or as a basis for affirmative relief, by the party making it.<sup>1</sup> In order to successfully plead a tender of payment in an action upon a money demand, the tender, whether of money or goods, must be sufficient in amount or value to liquidate the indebtedness sued upon.<sup>2</sup>

In jurisdictions requiring that the money be brought into court with the pleadings, a tender must not only be pleaded, but the money must be brought into court to give the pleader the advantage of his or her tender.<sup>3</sup> A plea of tender should not be burdened with explanatory, apologetic, or extenuating matters in no way going to the defense of the action, and the court should strike out such matters as mere surplusage.<sup>4</sup> Where it is necessary to keep a tender good, it must be specially alleged that the defendant has always been ready to pay the debt from the time of the tender.<sup>5</sup>

Where a tender has been waived, as where the other party has openly refused to perform in compliance with his or her contractual obligations, it is enough that the debtor plead his or her ability, readiness, and willingness and set forth in his or her pleading an offer to perform his or her obligations.<sup>6</sup>

Since the technical rules governing pleas of tender in actions of law do not apply in equity,<sup>7</sup> a general offer to do equity, or a plea of readiness and willingness, will suffice in a bill in equity.<sup>8</sup>

**Observation:**

A statute requiring that an answer of tender of money or of a thing in an action must be accompanied by a delivery of the money or such thing in the action to the clerk of the court is intended to prescribe a rule of pleading only and not to change any rule of substantive law.<sup>9</sup>

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Footnotes

- 1 [Haughey v. Heaney](#), 89 Fla. 102, 103 So. 400 (1925).
- 2 [Smith v. Price](#), 1952 OK 258, 206 Okla. 659, 246 P.2d 359 (1952).
- 3 [§ 32](#).
- 4 [Basler v. Sacramento Gas & Elec. Co.](#), 158 Cal. 514, 111 P. 530 (1910).
- 5 [Forwood v. Magness](#), 143 Md. 1, 121 A. 855 (1923).
- 6 [Rockland-Rockport Lime Co. v. Leary](#), 203 N.Y. 469, 97 N.E. 43 (1911).
- 7 [City of Breckenridge v. Pierce](#), 251 S.W. 316 (Tex. Civ. App. Fort Worth 1923).
- 8 [Caspar Lumber Co. v. Stowell](#), 37 Cal. App. 2d 58, 98 P.2d 744 (1st Dist. 1940); [Chicora Fertilizer Co. of Charleston, S.C., v. Dunan](#), 91 Md. 144, 46 A. 347 (1900).
- 9 [Kennedy v. Boles Investments, Inc.](#), 53 So. 3d 60, 71 U.C.C. Rep. Serv. 2d 597 (Ala. 2010).

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## 74 Am. Jur. 2d Tender § 47

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### Tender

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### VI. Pleading and Proof

## § 47. Burden of proof; questions for jury

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### West's Key Number Digest

West's Key Number Digest, [Tender](#)  28, 29

The burden of proving a valid tender is on the party asserting it,<sup>1</sup> and the burden of showing the tender and refusal is on the party pleading it.<sup>2</sup> To carry this burden, he or she must show such tender to have been absolute and free from all conditions,<sup>3</sup> as well as the present ability of immediate performance at the time of the tender.<sup>4</sup>

Whether a creditor has acted with due diligence and in a reasonable time to notify the debtor of his or her intent not to accept a tender is a question of fact for the jury that may be inferred from the circumstances unless only one reasonable inference may be drawn from them.<sup>5</sup>

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### Footnotes

- 1 [Weisfield v. Texas Land Finance Co.](#), 162 S.W.3d 379 (Tex. App. Dallas 2005).
- 2 [Graff v. Burnett](#), 226 Neb. 710, 414 N.W.2d 271 (1987); [Pittsburg Plate Glass Co. v. Leary](#), 25 S.D. 256, 126 N.W. 271 (1910).
- 3 [Pittsburg Plate Glass Co. v. Leary](#), 25 S.D. 256, 126 N.W. 271 (1910).
- 4 [Graff v. Burnett](#), 226 Neb. 710, 414 N.W.2d 271 (1987).
- 5 [Equitable Life Assur. Soc. of U.S. v. Brandt](#), 240 Ala. 260, 198 So. 595, 134 A.L.R. 555 (1940).

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**74 Am. Jur. 2d Tender Correlation Table**

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